COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1999

NOVA SCOTIA

Environment and Labour
Information and Business Services Division

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Nova Scotia Environment and Labour

Information & Business Services Division

Honourable David Morse
Minister

Kevin McNamara
Deputy Minister

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FOREWORD

This publication is the twentieth summary of grievance arbitration decisions produced by Nova Scotia Environment and Labour. It is cumulative for 1999.

The decisions included here are those which have been filed in accordance with amendments to the Trade Union Act, effective May, 1978. On occasion, summaries of arbitrations outside the jurisdiction of the Act have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Trade Union Act, and have been included for general interest.

Results of appeals of arbitrations decisions adjudicated by the courts of Nova Scotia are received by this Department on an ad hoc basis and are included in this publication accordingly.

Part I of the publication contains decision abstracts for 1999. Indices contained in parts II through IV pertain only to the decisions for 1999. A full, cumulative index is scheduled to be issued at a later date. Indexing standards for arbitration awards follow Canadian Labour Arbitration by D.J.M. Brown and D.M. Beatty (Agincourt: Canadian Law Book Co., 3rd edition, 1991).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Arbitration decisions under the Trade Union Act are now abstracted and indexed on a computerized database using InMagic software. The Department may provide copies of the database upon special arrangement. Please address all inquiries relating to printed and machine-readable formats to:

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Part 1

GRIEVANCE ARBITRATION DECISIONS

1999

DECISION: 99-001

Able Equipment Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Ashley, Susan M. - Arbitrator

David Roberts, for the Union

Cliff Dahms, for the Employer

January 30, 1999

ISSUES:

Discipline and discharge - Collective agreement limitations 7:1300; Grounds for - Work performance - Culpable incompetence 7:3510; Management rights - Job standard 4:2310; Interpretation - Management rights 4:2300; Skill and ability - Criteria of ability and qualifications - Requirements of the job 6:3100.

CIRCUMSTANCES:

The grievance relates to the termination of two journeymen Carpenters from their employment at a site in Cole Harbour for reasons of low productivity. The Grievors testified that, prior to being advised orally of their terminations, they were never advised that their productivity was in question. The Union argues that before an employee can be let go for reasons of lack of productivity or competence, s/he must be warned and given the opportunity to improve performance. The Employer claims that the Collective Agreement gives the Employer the right to hire, promote, direct and discharge employees and to judge their productivity.

AWARD:

The grievance succeeds. The Agreement sets out a three step process for terminating an unproductive employee. These steps include prior discussion of the problem and giving the worker a reasonable opportunity to improve. The requirements were not met and the Grievors were laid off improperly. They are to be reinstated with back pay and benefits to the date of their termination.

DECISION: 99-002

Nova Scotia (Human Resources) AND Nova Scotia Government Employees Union (NSGEU)

Ashley, Susan M. - Arbitrator

John D'Orsay, for the Union

Sarah Bradfield, for the Employer

February 15, 1999

ISSUES:

Illness or disability - Benefits 8:3300; Effect on employee - Absence from work 7:3110; Employer response - Discipline - Inability to work properly 7:3220; Medical premiums 8:3310; Return to work 7:3210, 8:3340; Resignation 7:7100 - Absence from work 7:3112; Discipline and discharge - Grounds for - Absence from work - Failure to notify employer 7:3110; Delay 2:3210.

CIRCUMSTANCES:

The Grievor was employed as a General Laundry Worker at the Nova Scotia Hospital. She commenced a period of short term illness leave but her application for long term disability benefits was denied. An appeal was also denied, but the Grievor did not return to work and she was deemed to have resigned her position. The Union argues that she had permission of the Employer to be on unpaid leave and there is nothing indicating that the Employer had rescinded that status until the letter of termination. Because of the Employer's action, she is no longer an employee and, as a result, has no status to pursue any further benefits that may be available. The Employer claims that following the Grievor's resort to the benefits provided in the Collective Agreement, she did not contact the Employer or return to work.

AWARD:

The grievance fails. The Agreement provides that where an employee is absent without permission for ten consecutive days, she is deemed to have resigned her position. The Grievor had exhausted her right to benefits under the Agreement and the Union can point to no provision which gives her any right to further benefits. Any permission that she had to be absent from work was dependent on having the right to pursue benefits.

DECISION: 99-003

Nova Scotia (Human Resources) AND Nova Scotia Government Employees Union (NSGEU)

Ashley, Susan M. - Arbitrator

John D'Orsay, for the Union

Sarah Bradfield, for the Employer

February 19, 1999

ISSUES:
Illness or disability - Reasonable accommodation 7:3220, 8:3340; Discrimination - Transfer 6:3000; Procedure - Powers of board of arbitration - Preliminary objections 3:2100; Time-limits - Restriction on arbitrability 2:1100; Human rights code - Concurrent jurisdiction 1:4000; Discrimination 6:3360; Statutes - Aid to interpretation 4:2230; Incorporated into collective agreement 4:1200.

CIRCUMSTANCES:
The Grievor has been employed in the Apprenticeship Division of the Department of Education and Culture since 1991 and became Supervisor, Client Services in 1996. He is currently on long term disability, suffering from mental illness. The grievance alleges that the Employer has not fulfilled its duty to accommodate his medical limitations. He is seeking a secondment or transfer. The Grievor has also filed complaints with the Human Rights Commission of Nova Scotia. The Union alleges that, where the workplace is likely to cause the disability, the Employer must modify the workplace, reassign the employee, or take other measures to avoid a recurrence of the problem. The actions taken by the Employer were inadequate and constitute adverse effect discrimination. The Employer argues that the Grievor wants something like recall rights although he has not exhausted long term disability benefits. He has not been placed because no one has been able to identify a position for which he is qualified. The duty to accommodate does not require an employer to create a new job, or one that is not productive, and does not require the displacement of an incumbent.

AWARD:
The grievance succeeds. This case explores the extent of the obligations under the Collective Agreement provisions relating to human rights and occupational health and safety. The Employer raised an objection based on the timeliness of the grievance. The preliminary objection is dismissed. The issue is whether the Employer took proper steps to meet the duty to accommodate the Grievor's mental disability, the medical evidence being that his disability, while pre-existing and serious, is exacerbated by his workplace. It has not been argued that this grievance discloses direct discrimination by the Employer but falls under the definition of adverse effect discrimination. The Employer is in the best position to be aware of the availability of employment options. They are, however, entitled to insist on some assessment process to ensure that the Grievor is able to do the work. The Arbitrator is not satisfied that the Employer has made reasonable efforts to identify an appropriate placement. She orders that the Employer shall take steps, in consultation with the Union

and the Grievor, to find a suitable accommodation.

DECISION: 99-004

Trenton Works Ltd. AND United Steelworkers of America, Local 1231

MacKeigan, Peter J. - Arbitrator

Cal Luedee, for the Union

John MacPherson, for the Employer

January 30, 1999

ISSUES:
Overtime 5:3200 - Distribution of overtime 5:3220; Management rights 4:2310; Interpretation - Aids to interpretation - Past practice 2:2220; Ambiguity 2:2220, 3:4400; Earlier versus later clauses 4:2100; Extrinsic evidence 4:2250; Preamble 4:2100; Negotiating history 3:4420; Estoppel 2:2210.

CIRCUMSTANCES:
The grievance relates to the issue of overtime denied to the Grievor who worked at Trenton Works, a heavy industrial manufacturer of railway box cars. It has broader implication surrounding the whole issue of how overtime is allocated on the week-ends. The Union argues that the employees are required to punch a time clock before 8:00 a.m. each Thursday in order to signify their availability for overtime on the week-end. The Employer must select employees for overtime from this list. If an employee does not punch the clock, then he is deprived of the right to grieve his failure to be appointed. The Employer argues that the requirement does not restrict the ability of the Employer to pick employees without reference to the list. The Union argues in the alternative that there is ambiguity within the Collective Agreement relating to the preamble and how it applies to the remainder of the Agreement and that there is an estoppel as evidenced by the actions of the Employer.

AWARD:
The grievance succeeds. The Arbitrator is prepared to accept there may be some latent ambiguity within the provisions of the Agreement. He is not satisfied that either of the parties thought through the issue of overtime and the punch clock. The bargaining history lacks the cogency and clarity required to be of assistance in interpretation. The notices posted, which confirmed a certain course of action by the Employer, form the representation necessary for the establishment of an estoppel. The Employer is thereby required, during the remainder of the current Agreement, to select its overtime relating to weekends firstly from those individuals who have punched the overtime clock.

DECISION: 99-005

New Castle Hotel Corp. AND Hotel Employees & Restaurant Employees International Union (HERE), Local 662

Outhouse, S. Bruce - Arbitrator

Ronald A. Stockton, for the Union

Alison J. Hurewitz, for the Employer

January 29, 1999

ISSUES:

Severance pay 8:3800; Collective agreement - Memorandum of agreement 4:1100; Interpretation - Ambiguity 2:2220; Canons of Construction 4:2100; Estoppel 2:2200.

CIRCUMSTANCES:

The grievances involve severance pay. The Halifax Hilton closed in 1993 and the employees working there lost their jobs. The Employer hired staff and reopened the hotel in the summer of 1996. When they became interested in the hotel property and negotiated a Memorandum of Agreement with the Union, former employees could become entitled to severance pay in certain defined circumstances. A number of disputes arose concerning who was eligible. The parties were able to resolve most of the outstanding claims, leaving only four which are in dispute, as well as an interpretive issue relating to the eligibility of former employees with less than 18 months service. The Employer takes the position that severance pay is calculated in discreet increments of one week and that, in order to be entitled to severance, an employee would have to have a minimum of 18 months or two years' service, depending upon the paragraph applied. The Union maintains that the proper method of calculation is to divide the total months of service by 18 months [or 24 months] and multiply by the employee's weekly rate of pay. In this way, every employee would receive an entitlement based on actual length of service. The Employer contends that the Union, by signing off on a number of severance payouts, is effectively estopped from insisting on a different method of calculation.

AWARD:

The grievance succeeds. The Union's interpretation is reasonable in that it produces consistent and equitable treatment of employees in relation to their actual length of service. Their proposed method of calculation is correct and the language is not ambiguous. The doctrine of estoppel can have no application here because the essential element of detrimental reliance is completely lacking. Employees with less than 18 or 24 months of service are to receive a pro-rated severance payment of less than one week. The Employer is directed to pay severance in the four individual claims in the amounts set out.

DECISION: 99-006

Halifax Regional Water Commission AND Canadian Union of Public Employees (CUPE), Local 227

North, Gregory I. - Arbitrator

Peter Baxter, for the Union

John C. McPherson, for the Employer

January 25, 1999

ISSUES:

Job posting 5:2520, 6:2310 - Criteria - Education 6:3320; Seniority - Applications - Promotion, demotion and transfer 6:2000, 6:2100; Good faith - Reorganization of work 5:2000; Skill and ability 6:3100; Skill and ability 6:3000 - Arbitral review - Senior employee with required ability 6:3210.

CIRCUMSTANCES:

The grievance alleges that the Employer breached certain provisions of its Collective Agreement by not awarding to the Grievor the position of Sub- Foreman. The Halifax Regional Water Commission was created as part of the amalgamation process occurring in the Halifax Regional Municipality which necessitated a complete re-evaluation of staffing requirements and an internal organizational review. There were five internal applicants for the position of Sub-Foreman in the Operations Department, with the Grievor having the most seniority. None of the candidates met all of the minimum qualifications for the position, but the Committee decided to make the appointment from among them. The Union submits that the Agreement is a threshold or sufficient ability contract in which, subject to ability or competence, seniority governs. As neither the Grievor nor the incumbent met the posted educational requirement, the Commission was required to look at all factors, not just education. The Employer submits that the requirement to appoint the senior applicant does not apply if no candidate meets the minimum requirements. In the alternative, the Arbitrator is limited to an assessment of whether the decision was made in bad faith, arbitrarily or in a discriminatory manner.

AWARD:

The grievance fails. Based on the changing nature of the responsibilities being discharged by a Sub-Foreman, a minimum educational requirement of Grade 12 is a reasonable pre-condition. There was no unfairness in the process conducted by the Commission with respect to the Grievor. Where none of the applicants who responded to the job posting met the minimum job requirements, the Employer was entitled to choose without regard to seniority. There is no evidence that the Employer acted in bad faith, arbitrarily, or in a discriminatory manner.

DECISION: 99-007

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union (NSGEU)

Archibald, Bruce P. - Arbitrator

Raymond Larkin, for the Union

Terry Roane/John D. Plowman, for the Employer

February 2, 1999

ISSUES:
Discipline and discharge - Company rules 4:1500; Grounds for - Sexual harassment 7:3430, 7:3580; Management rights - Power to discipline 7:1000; Witnesses - Credibility 3:5100; Remedies - Substitution of lesser penalty 2:1470, 7:4000.

CIRCUMSTANCES:
The Grievor was disciplined for harassing behaviour which allegedly violated the Employer's Policy on Personal Conduct. The Employer suspended the Grievor without pay for ten working days, transferred him, demoted him from his classification of Store Manager to that of Assistant Manager with attendant loss of salary and potential pension and other benefits, and required him to complete a programme in sensitivity training. Two complainants alleged that he had sexually harassed and assaulted them over a period of several years, but the Grievor denied that the central allegations had ever occurred. The Union claims that the Employer failed to follow the mandatory procedures laid out in its policy. The Employer argues that the policy uses language which is directory rather than mandatory and that the failure of the employees to confront the Grievor early in relation to his alleged offensive conduct does not procedurally vitiate the Employer's discipline.

AWARD:
The grievance succeeds in part. The Arbitrator concludes that the Employer was not in breach of its Policy on Personal Conduct in the manner in which it responded to the complainants' allegations. The policy establishes a helpful but flexible guideline in cases of harassment or discrimination, but the Employer here was faced with what appeared to be a pattern of serious sexual abuse being perpetrated by one of its supervisors upon more than one employee. However, the evidence does not establish on a balance of probabilities that the Grievor engaged in any of the misconduct alleged by the first complainant whose evidence is utterly unreliable. The Grievor did engage in minor forms of harassment of a sexual nature toward the second complainant which justify discipline. The Arbitrator finds the actual discipline imposed to be far in excess of that which is warranted. The transfer and the programme of sensitivity training were appropriate. A suspension of two days is substituted for the original 10 day suspension. The demotion to Assistant Manager is rescinded and the Grievor is to be reinstated to the status of Manager and to have back pay and all benefits restored. The Employer acted reasonably and in good faith in their investigations and is not to be thought at fault for their actions.

DECISION: 99-008

Ben's Ltd. AND Bakery, Confectionery & Tobacco Workers' International Union (BCT), Local 446

Kydd, William H. - Arbitrator

Rene Quigley, for the Union

Ross Langley, for the Employer

January 15, 1999

ISSUES:
Schedules 5:3100; Estoppel 2:2200, 2:2210, 2:2220; Negotiating history 3:4420; Past practice 3:4430; Management rights - Schedules 5:3100.

CIRCUMSTANCES:
The Union alleges that the Employer breached the Collective Agreement by re-scheduling a shift of workers to work on Saturdays when they traditionally had that day off. For marketing reasons, the Employer decided that it was important to have fresh bread available on Mondays, which required moving the bread making operation back into the week-end. The Union objects to the scheduling changes as being arbitrary and not required for business reasons. The Employer should be estopped from relying on its written management rights because of past practice in which shift assignments would only be changed by the process of bidding for posted jobs. The Employer argues that there are no defined hours and there is no language in the Agreement which restricts its right to schedule work. In the alternative, estoppel applies because the Union accepted the proposed new schedule.

AWARD:
The grievance fails. There is no evidence that the disputed scheduling was not fair, discriminatory or not done for good business reasons. The fact that job postings include a description of the days and times worked does not bind the Employer to continue the same times and shifts. The Union should be estopped from disputing the scheduling because it represented to the Employer that the proposed schedule was acceptable.

DECISION: 99-009

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union (NSGEU)

Lederman, Peter - Arbitrator

John D'Orsay, for the Union

Terry L. Roane, for the Employer

February 4, 1999

ISSUES:
Discipline and discharge - Grounds for - Absence from work 7:3100, Alcoholism 7:3200, 7:3220, 7:4422; Warning - Warning as discipline 7:4210; Interpretation - Aids to interpretation - Dictionaries 4:2210.

CIRCUMSTANCES:
The Grievor is a regular part-time employee of the Liquor Commission. His position was terminated due to problems with his job performance and attendance record caused by his addictions to alcohol and cocaine.

AWARD:
The grievance fails. The Arbitrator finds that there was a clear violation of the conditions contained in a warning letter outlining the terms for the Grievor's continued employment. His discharge was justified and proper.

DECISION: 99-010

Kimberly-Clark Nova Scotia AND Communication, Energy & Paperworkers Union of Canada (CEP), Local 440

MacPherson, John C. - Arbitrator

Dennis Grant, for the Union

Eric Durnford, for the Employer

February 12, 1999

ISSUES:
Contracting out 5:1300; Interpretation 4:2000, 4:2100, 4:2300 - Earlier versus later clauses 4:2100.

CIRCUMSTANCES:
There are two grievances alleging the contracting out of bargaining unit work, contrary to the provisions of the Collective Agreement. They relate to the roping off of a portion of the parking lot by members of the Canadian Corps of Commissionaires. The Employer operates a pulp mill at Abercrombie Point. It has a contract with the Commissionaires to provide certain services, including security and traffic control for the mill. They are excluded from the bargaining unit. The Union argues that this is unskilled work required for the operation and maintenance of the mill and, therefore, should be performed by members of the Labour Department. If this is not contracting out, then it is work of the bargaining unit. The Employer claims that there is no contracting out in this instance because this work was never included within the bargaining unit. The essence of the work relates to traffic control and is, therefore, appropriately performed by the Commissionaires.

AWARD:
The grievance succeeds. The evidence is clear that a primary function of the Commissionaires is traffic control in the parking lot. There is no dispute that they are an independent contractor in their relationship with the Company. This work was not exclusive to the Labourers, however, from time to time, Labourers have performed it. Therefore, the work of the setting out of barrels and roping off of an area of the parking lot is the work of the bargaining unit and was improperly contracted out.

DECISION: 99-011

Sifto Canada Inc. AND Communication, Energy & Paperworkers Union of Canada (CEP), Local 824

MacDonald, David J. - Arbitrator

Gordon Forsyth, for the Union

John J. Barrack, for the Employer

February 22, 1999

ISSUES:
Discipline and discharge - Grounds for - Sleeping on job 7:3570; Arbitrability - Settlement of grievance 2:3230; Disciplinary penalties - Culminating incident 7:4310; Disciplinary record 7:4310; Mitigating factors 7:4400.

CIRCUMSTANCES:
This matter involves two grievances filed by the Grievor who was employed as a Compactor Operator prior to his dismissal. The Grievor is alleged to have been sleeping on the job. The Employer contested the arbitrability of the second grievance on the basis that it stems from a without-prejudice settlement of a prior disciplinary incident. It is the Union's view that the settlement had given the Grievor a reprieval from termination for all but the most serious of offenses.

AWARD:
The grievance succeeds. The Arbitrator concludes that the second grievance is arbitrable. The evidence does not support a finding of bad faith on the part of the Employer; however, the circumstances surrounding the settlement are pertinent in regard to mitigation. There was no lost production or safety hazard and no adverse consequences suffered by either the Employer nor any employees as a result of the Grievor's sleeping on the job that day. The Employer was frustrated by the Grievor's response to the incident, as well as his unwillingness to acknowledge or take responsibility for his prior unacceptable performance. Written warnings and suspensions were not having the desired corrective result. The one overriding mitigating factor is that there was no deliberate dereliction of duty. The Arbitrator finds that there are sufficient mitigating circumstances to overturn the dismissal and substitute a suspension without pay. The Grievor shall be reinstated to his former position but will be on probation for a period of two years.

DECISION: 99-012

Canada Post Corp. AND Canadian Postmasters & Assistants Assn.

Christie, Innis - Arbitrator

Rowena Anderson, for the Union

Tim Cole, for the Employer

March 7, 1999

ISSUES:

Promotion, demotion and transfer - Promotion defined 6:2100; Reasonableness 6:3100; Time-limits - Restriction on arbitrability 2:1100; Job classifications and descriptions - Creation or revision 5:2000; Procedure - Order of proceeding - Parties 3:1200; Powers of board of arbitration - Preliminary objections 3:2100; Right to counsel 3:1200; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES:

There are two grievances alleging that a Third Party was promoted to the position of Postmaster in Kingston, N.S. although, by retroactive effect, at the relevant time she was not eligible to apply for the position. The issue is whether she was rendered ineligible to apply by the fact that the position from which she had applied was reassessed and retroactively made equal to the one for which she applied. Under the Collective Agreement, had the two positions been equal at the time of her application, she could not have applied for the promotion but could have applied for a transfer. The Union takes no position on the grievances. The Employer objects that they were filed too late. Both Grievors and the Third Party have agreed with the Employer and the Union that the Arbitrator should decide this matter on the basis of written submissions.

AWARD:

The grievances fail. The circumstances giving rise to these grievances involve the timing of the reclassification of the LaScie Post Office and the filing of the individual grievances were clearly in time. A vacant position is to be filled, first, by transfer and, second, by promotion of the most qualified eligible candidate. The reassessment of the LaScie Post Office, which occurred during the promotion competition here in issue, did not affect the Third Party's eligibility for the Kingston Postmaster position. The fact that the upgrading was made retroactive to a date prior to her application did not change this. She met the selection standards and was the most qualified employee.

DECISION: 99-013

Surrette Battery Co. Ltd. AND International Brotherhood of Electrical Workers (IBEW), Local 625

MacKeigan, Peter J. - Chair; Cook, Robert; Simpson, Carl

Gordon Forsyth, for the Union

Glenn Hall, for the Employer

February 26, 1999

ISSUES:

Working hours and shifts 5:3100; Job classifications and descriptions - Creation or revision - Classification outside the unit 5:1400; Job posting 5:2520, 6:2310; Policy grievance - Nature of 2:3124; Work assignment outside unit 5:1500; Remedies - Types of remedy - Declaration 2:1450; Seniority - Applications - Promotion, demotion and transfer 6:2000, 6:2100, Reorganization of work 5:2510.

CIRCUMSTANCES:

This is a policy grievance to resolve the interpretation of provisions of the Collective Agreement relating to the establishment of an afternoon or evening shift and the ability of the Employer to transfer employees from other classifications to fill this shift. The Employer manufactures batteries for automotive and other industries. From time to time, production shifts from the automotive to the industrial department to meet market demands. This, in turn, requires that employees who normally work in the automotive department, the warehouse, or other areas be moved to the industrial department. Union officials state that the situation was grieved because of their concern that the second shift was becoming more frequent and had taken on the nature of a new job as opposed to a sporadic shift change.

AWARD:

The grievance succeeds in part. The Board rejects the concept of a notional lay-off and finds that the Employer has the right under the Agreement to re-deploy the workforce without resorting to a lay-off and posting procedure. They must recognize seniority in the assignment of shifts. This decision is declaratory in nature, at the request of the parties.

DECISION: 99-014

Amherst (Town) AND Canadian Union of Public Employees (CUPE), Local 1233

MacDonald, David J. - Arbitrator

Terry Goulding, for the Union

Matthew McPherson, for the Employer

March 12, 1999

ISSUES:
Vacation - Computation of vacation and vacation pay 8:3220, 8:3230; Interpretation - Ambiguity 2:2220; Past practice 3:4430; Estoppel 2:2210.

CIRCUMSTANCES:
The Town advised the Operational Services Department employees that it was making a change to their vacation entitlement. The Union filed a grievance stating that vacation time has never been pro-rated and requesting a continuance of the pre-existing system. They assert that the Collective Agreement is ambiguous, consequently, resort must be made to past practice. They further argue that the Employer is estopped from changing a long standing practice without due notice to the Union. The Town acknowledges that there has been an overpayment of vacation entitlement for the past twenty-three years, but it was made erroneously and wrongly rather than as a result of any ambiguity. By issuing a written procedure, the Town was giving notice that it was reverting to the strict terms of the Agreement.

AWARD:
The grievance succeeds. The Arbitrator finds no ambiguity in the basic entitlement as set forth in the Agreement. However, the circumstances encompass the essential elements of an estoppel given there was a course of conduct over a period of twenty-three years wherein the Town allotted the increased vacation entitlement. The estoppel will remain in effect through the term of the current Agreement when it will terminate and the parties will revert to their strict contractual rights under the vacation article.

DECISION: 99-015

Skyline Plumbing & Heating Ltd. AND Sheet Metal Workers' International Assn., Local 56

MacKeigan, Peter J. - Arbitrator

Joseph L. Wall, for the Union

Allen Noseworthy, for the Employer

January 4, 1999

ISSUES:
Collective agreement - Form and content - Pension, insurance and welfare plans 4:1400.

CIRCUMSTANCES:
The Union alleges that the Employer failed to remit contributions to the Trust Fund pursuant to the Collective Agreement.

AWARD:
The grievance succeeds. A consent award is made in which the Employer is directed to remit all outstanding benefits to the Union.

NOTES:
Consent Award

DECISION: 99-016

Nova Perma Coating Ltd. & Ellis Insulation Specialists AND International Assn. of Heat & Frost Insulators & Asbestos Workers, Local 116

Slone, Eric K. - Arbitrator

N/A, for the Union

N/A, for the Employer

January 29, 1999

ISSUES:
Union - Security - Check off 9:1200, Remedies - Damages 2:1426.

CIRCUMSTANCES:
The Union alleges that the Employer breached the Union Security provisions of the Collective Agreement.

AWARD:
The grievance succeeds. A consent award is made in which the Employer is directed to pay damages to the Union.

NOTES:
Consent Award

DECISION: 99-017

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

Jeff Woods, for the Union

Joanne Harrington, for the Employer

February 23, 1999

ISSUES:
Working hours and shifts 5:3100; Settlements 2:3230.

CIRCUMSTANCES:
The Union alleges that the Employer was unreasonably preventing the Grievor from returning to work for more than two hours per day.

AWARD:
As the result of agreed mediation by the Arbitrator, the parties came to a full and final settlement. A consent award is made in which the Employer agrees to pay damages and to develop a workplace reintegration program for the Grievor which will allow her to increase her hours of work up to a full shift of eight hours per day within a period of not more than twelve weeks. Other stipulations are made as to duties and evaluation relating to the Grievor's physical capabilities.

NOTES:
Consent Award

DECISION: 99-018

Truro (Town) AND International Assn. of Firefighters, Local 1627

Kydd, William H. - Chair; Durnford, Eric B.; Quigley, Rene

Paul Dober, for the Union

John T. Rafferty, for the Employer

April 15, 1999

ISSUES:
Job classifications and descriptions - Bargaining unit work defined by 5:1200; Job classifications and descriptions - Creation or revision 5:2200; Job classifications and descriptions - Creation or revision - Change of work load 5:2410; Management rights - Work assignment 5:2000; Work assignment - Contracting out - Employees outside unit 5:1400.

CIRCUMSTANCES:
The grievance filed by the Union alleges that the Employer violated Article 23 of the Collective Agreement by having the Fire Chief and the Deputy Fire Chief perform the duties of the Chief Operator, a bargaining unit position. The Union states that there has been no negotiated amendments to the Collective Agreement to allow for a new supervisory position. The Union asks, by way of remedy, that the Employer be required to re-post the Chief Operator position. The Employer argues that there is no requirement in the Collective Agreement to fill the position.

AWARD:
The grievance fails. The Board finds that there was no breach of Article 23. In the present case, there was no creation of a new supervisory position. Instead, the supervisory duties of the Chief and Deputy Chief were increased. The Board also finds that the Employer did not breach the Collective Agreement by having the Chief and Deputy Chief perform bargaining unit work. There is an implied restriction, where there is a Collective Agreement, on the Employer's right to assign work. This is to protect the integrity of the bargaining unit. It follows that the work sought to be assigned must be of such a degree as to threaten such integrity. The Board concludes that the degree of work that has moved out of the bargaining unit does not constitute a breach of the Collective Agreement, because the new duties being performed by the Chief and Deputy Chief are only a small proportion of a regular work week, and the supervisory nature of the work also dilutes the suggestion that its loss to the bargaining unit poses a threat to bargaining unit integrity.

DISSENT:
(Quingley) (Quigley) Article 23 indicates that changes in the position of Chief Operator would be negotiated by the Employer with the Union. This did not happen. The Fire Chief and the Deputy Fire Chief committed an improper act by offering an employee the combined positions of Fire Inspector and Chief Operator, for more money, without regard for the Collective Agreement. Some

of the evidence with regard to time spent on supervisory functions by the Chief and Deputy Chief was an estimate and not supported by evidence, and duties of the Chief Operator were being performed by department members. If the Chief Operator position is not re-posted, the Employer should be directed to negotiate a new rate of pay for the department members who perform the work of Chief Operator. Currently, the employees could file another grievance claiming the Employer is not compliant with the wage structure.

DECISION: 99-019

East Coast Rope AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 4624, Unit 5

MacDonald, David J. - Arbitrator

Lynn Pollock, for the Union

Sean Burke, for the Employer

April 26, 1999

ISSUES:
Bargaining unit - Employees excluded - Temporary, casual or part-time 5:1124; Statutory holidays - Qualifying days 8:3120.

CIRCUMSTANCES:
The Grievor is a part-time machine operator who is called in to work when required. It is his position that the Employer owes him holiday pay for the Labour Day holiday in 1998, as he worked both scheduled shifts before and after the holiday, as per the Collective Agreement. He has received holiday pay for other holidays previously. It is the Employer's position that Article 16.01 of the Collective Agreement, concerning paid holidays, only applies to regular full-time machine operators, and because the Collective Agreement is silent with regard to part-time call-in employees, then these employees' entitlement to pay falls under the jurisdiction of the Labour Standards Code, not the Collective Agreement.

AWARD:
The grievance succeeds. The Employer's position cannot be accepted as it is based on erroneous assumptions. The first of these is that because some employees are not specifically mentioned in the Collective Agreement, they are then excluded from entitlements implicit therein. The opposite is true. It would require specific language in the Collective Agreement to exclude part-time machine operators. The second erroneous assumption is that only full-time employees whose shifts are scheduled in advance are considered to have shifts for the purposes of Article 16.01. Finally, the Employer's adoption of the policy which tries to treat employees in this type of situation as being

outside of Article 16.01 does not negate nor supercede the clear contractual requirements and obligations of that Article. The Grievor is to be paid the full holiday pay to which he is entitled for Labour Day 1998.

DECISION: 99-020

Nova Scotia (Justice) AND Nova Scotia Government Employees Union (NSGEU)

Archibald, Bruce P. - Arbitrator

Kim Turner, for the Union

Sarah Bradfield, for the Employer

March 22, 1999

ISSUES:
Arbitrability - Procedural limitations - Form of grievance 2:3122; Grievance - Settlement of grievance 2:3230; Seniority - Applications 6:2000.

CIRCUMSTANCES:
This case involves the request by the Grievor to have his service as a Youth Worker in a young offender's facility recognized for the purposes of pay and benefits in connection with his present status as Corrections Officer in an adult corrections facility. While the Grievance is the procedural trigger for the arbitration, the arbitration itself will consider, at this point, only the preliminary issue of whether the matters referred to in the grievance had been the subject of a previous settlement binding upon them. The Union argues that the Arbitrator has jurisdiction to enforce a settlement of a grievance, or enforce an agreement which is in relation to an arbitrable, grievable or adjudicable issue. Further, the Union argues that there was an enforceable settlement in this situation, and that the settlement has defined or definable terms, which have been breached by the Employer, for which the Grievor is owed full compensation. The Employer responds that there was no settlement of a formal grievance, since none had come forward at relevant times, and that the Arbitrator has no jurisdiction to enforce settlements of grievable issues under the Corrections Act. Further, the Employer argues that there was no settlement, or if there was, it did not extend to the full range of issues, including pay, as asserted by the Union.

AWARD:
The grievance fails. The Arbitrator concludes that he has the authority and the obligation to enforce a settlement agreement if an enforceable agreement is proved to exist in relation to a grievance or grievable issue. The Corrections Act, in section 29(4), contains final settlement provisions which differ little from those in jurisdictions where the settlement agreement enforcement arbitral

jurisprudence is well entrenched. The principle that settlement agreements must be honoured on grievable issues has clearly been invoked successfully in cases where Collective Agreement grievance procedures have not been formally set in motion. There was, however, no valid settlement agreement between the parties as to the grievance or grievable issue concerning the Grievor's placement on the pay scale in relation to his service as a youth worker. Both the Union and the Employer had different beliefs regarding what "service related benefits" referred to in the relevant correspondence. The evidence shows that they were not in agreement as to the pay scale issue, and there was no settlement on that issue.

DECISION: 99-021

National Gypsum (Canada) AND International Union of Operating Engineers (IUOE), Local 721 & 721B

Archibald, Bruce P. - Arbitrator

Gordon N. Forsyth, for the Union

Terry Roane, for the Employer

April 1, 1999

ISSUES:

Management rights - Work assignment 5:2000; Job classifications and descriptions - Creation or revision 5:2200; Job classifications and descriptions - Creation or revision - Change of work load 5:2410; Wages - Rates for new and revised classifications 5:2440, 8:1000.

CIRCUMSTANCES:

The Employer in this case reorganized and reallocated some of its job functions at its gypsum quarry. The Union claims that some of the results of the Employer's changes create new job classifications and require the Employer to confer with the Union and agree upon wage rates, as per Article 18(b) of the Collective Agreement. The Union sees a new classification in the Carloader/Sampler on the morning shift and also a more complex classification in the Carloader/Sampler/Shunter on the afternoon shift. The Union argues that the nature of the tasks, their simultaneous or cumulative execution and the working environment have all changed to such an extent that the new situation cannot be seen as merely a change in emphasis or a new mix of the old duties. The Employer says the issue is whether there has been a significant change in the nature of the jobs in question and argues that there has been no change. The Employer acknowledges that Article 18(b) is triggered where there has been a new classification created, but asserts that what has occurred with regard to Carloading, Sampling and Shunting is simply an example of the established practice of using employees in classifications other than their own, as recognized by the Union in

Article 18(f)(1) of the Collective Agreement.

AWARD:
The grievance succeeds in part. There is a new classification of Carloader/Sampler which must be recognized as such under Article 18(b) of the Collective Agreement. The evidence shows that the new Carloader/Sampler job is more than the sum of the parts inherited from the old classifications of Carloader Operator and Sampler. The new arrangements by which the Carloader and Sampler functions have been cumulated and must be performed simultaneously has made for substantive and qualitative changes in the duties and responsibilities of these classifications, such that there is now a new classification of Carloader/Sampler to be recognized as such under Article 18(b). The Employer, however, is correct in stating that the Shunting and the Carloading/Sampling are separate functions which differ from one another. Thus, while the afternoon Shunting is done by a Carloader/Sampler, it is not part of the latter's new classification. Here the Employer is using employees in classifications other than their own and paying for them appropriately as the Union has recognized it may do under Article 18(f)(1) of the Collective Agreement.

DECISION: 99-023

Halifax Regional Municipality AND Halifax Regional Professional Firefighters Assn., Local 268

Darby, Peter E. - Arbitrator

Paul Dober, for the Union

Terry L. Roane, for the Employer

April 14, 1999

ISSUES:
Vacancy 5:2510; Past practice 3:4430; Collective agreement - Ambiguity 2:2200; Estoppel 2:2210; Management rights 4:2310.

CIRCUMSTANCES:
The grievance concerns the failure of the Employer to fill the last of seven vacancies in the rank of Captain. The Union asserts that the Promotional Routine to fill this seventh vacancy ought to be restricted to Lieutenants of the Dartmouth Fire Department and conducted in accordance with the Dartmouth Agreement. Their position is that there was such a vacancy in the rank of Captain and the Employer was obligated to fill it in compliance with an established list of successful candidates. If the list was exhausted, the Employer had to conduct a further Promotional Routine in accordance with past practice. The Employer contends that the Agreement does not require it to agree to routines over and above the mandated ones held every two years. Even assuming that there was a vacancy, they are not obligated to fill it.

AWARD:
The grievance fails. There is no estoppel because there was no representation of any kind by the Employer that it would always have sixteen Captains and Lieutenants, that it always intended every vacancy in such ranks to be filled , or that it would hold Promotional Routines over and above the mandated ones. The Arbitrator finds that there is no ambiguity in the language of the Collective Agreement. Even if factually there is a vacancy, it exists only if the Employer intends to fill it.

DECISION: 99-024

Children's Aid Society of Cape Breton AND Canadian Union of Public Employees (CUPE), Local 3010

Veniot, Milton J. - Chair; Morrison, Fraser; Gaskell, Tom

Sandra MacNeil, for the Union

George S. Khattar, for the Employer

April 23, 1999

ISSUES:
Company rules - Collective Agreement 4:1500; Travel allowance 8:3700; Vacancy 5:2510; Vacancy - Job posting 5:2520; Management rights - Work assignment 5:2000; Good faith - Vacancies, transfers, promotions 5:2300; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES:
This arbitration deals with two grievances. First, the Union alleges that the Employer failed to post a full time secretarial position vacant in the bargaining unit. The Union argues that the Employer acted in bad faith in that it attempted to manipulate the three union locals in an effort to get the Parent Counsellor Program positions into the bargaining units in which it wished them to be. Having failed to get the result it wanted, the Union alleges that the Employer, in retaliation, has refused to post the secretarial position. The Employer argues that there is not enough work to warrant a full time secretary. Second, the Union alleges that the Employer has violated the Collective Agreement by publishing and enforcing a new travel policy. The Union argues that the travel policy violates the provisions of Article 16:01(a), which require employees to be reimbursed at the same rates paid to provincial government employees for mandatory travel. The Employer's position is that the term "agency work", as contained in Article 16:01(a), really means "regular work," and does not include trips outside the region for training; therefore Article 16:01(a) does not apply.

AWARD:
The grievances fail. For the posting grievance, the Employer is not found to have acted in bad faith.

The Employer attempted to secure a resolution of the issue of which bargaining unit was appropriate for the relevant positions, and attempted to get the appointment process moving in the interim. No attempt to stir dissension among the membership of the three union locals is visible. Bad faith claims fail for want of sufficient proof. The Employer is not obligated to post the secretarial position. There is no case law cited to support the position of the Union that an employer must post a position simply because it has the money to pay for it. The evidence will not support the conclusions that the Employer has filled a vacant position; in all periods down to the date of the hearing, there was no full time job of secretarial work to be done in the Parent Counsellor Program. For the travel policy grievance, where a work related attendance is mandatory, such as training, it falls under the meaning of "agency work" in Article 16:01(a). The travel policy, however, does not conflict with the Collective Agreement. The travel policy does not impose any requirement on employees to use their own vehicles, and Article 16:01(a) does not engage the Employer's responsibility to pay for an employee who chooses to use his or her own vehicle. Also, the travel policy is found to be reasonable. A requirement that up to four employees should be required to share a single vehicle when traveling to a common work related assignment is not prima facie unreasonable.

DECISION: 99-025

Westin Nova Scotian Hotel AND Hotel Employees & Restaurant Employees International Union (HERE), Local 662

Kydd, William H. - Arbitrator

Nancy Elliot, for the Union

Shelley Alward, for the Employer

March 10, 1999

ISSUES:

Management rights 4:2310 - Revision of job content 5:2200; Good faith - Reorganization of work 5:2000; Work assignment - Changes in job function 5:2410.

CIRCUMSTANCES:

The Union alleges that the Employer has breached the Collective Agreement by requiring Room Attendants to house clean rooms as part of the daily maximum of fifteen rooms that it requires be cleaned. In the alternative, the Union argues that the Employer is breaching the management rights provisions by exercising them without discrimination, in a reasonable business-like manner and in good faith.

AWARD:
The grievance succeeds. It is clear from the management rights clause that it is the prerogative of the Employer to determine how rooms are to be cleaned, and to assign who is to do the work. The Arbitrator is persuaded by the evidence, however, that the Employer's work assignments have frequently been unreasonable. The Employer needs to make its work assignments so that the normal worker, working efficiently, should be able to complete the required work. The Union is entitled to a declaration to that effect.

DECISION: 99-026

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union (NSGEU), Local 1670

Scaravelli, Nicoll M. - Arbitrator

Turner, Kim, for the Union

Roane, Terry, for the Employer

April 16, 1999

ISSUES:
Policy grievance - Nature of 2:3124; Vacancy 5:2510; Job posting 5:2520; Arbitrability - Delay 2:3210; Laches 2:3210; Procedural limitations - Form of grievance 2:3122; Procedure - Powers of board of arbitration - Preliminary objections 3:2100; Past practice 3:4430; Estoppel 2:2200.

CIRCUMSTANCES:
The Union alleges the Employer has not posted or filled vacant Assistant Manager positions as outlined in the Collective Agreement, with respect to 5 stores. They amended the grievance by letter adding one additional store, and later requested an amendment adding 27 more. The Employer raises preliminary objections as to the arbitrability of the initial grievance as amended, and also to the Union's latest request for further amendment. The Employer's position is that, although a policy grievance, the provisions of the Agreement apply due to past practice. The grievance is out of time and the Union is further prevented from bringing it forward due to estoppel and laches. The Union's position is that the Agreement does not address policy grievances. The grievance is permissible under the provisions of the Trade Union Act which does not contain time limits for filing. The Employer had agreed to proceed with arbitration during negotiations for the new Agreement and is prevented from raising the objections.

AWARD:
The preliminary objection fails. The Arbitrator is satisfied that the Employer waived these preliminary issues during negotiations of the new Agreement. The Union is seeking an order in the

form of a declaration requiring the Employer to fill vacancies where it has determined that sufficient bargaining unit work is being performed by clerks in specific stores, to the extent the Employer is violating the Agreement. The addition of more stores of different classification does not appear to change the issue nor expand jurisdiction.

DECISION: 99-027

Maritime Telegraph & Telephone Co. Ltd. AND Atlantic Communication & Technical Workers Union

MacKeigan, Peter J. - Arbitrator

Ronald A. Pink, for the Union

Jan E. McKenzie, for the Employer

May 7, 1999

ISSUES:
Job posting - Criteria 6:3300; Skill and ability - Classification 5:2000; Seniority 6:0000; Interpretation - Aids to interpretation - Ancillary documents 4:1200; - Ambiguity 3:4400; Negotiating history 3:4420.

CIRCUMSTANCES:
The grievance relates to a job posting. The Union argues that the Employer failed to take into account the qualifications and experience of the Grievor, together with his seniority, as required in the Collective Agreement. They also contend that it is the classification, and not the position within the classification, which is posted. The Employer responds that the position posted was a specialized position requiring technical knowledge. The Union also states that the Agreement, when read in conjunction with the Letter of Understanding, created a latent ambiguity which would permit reference to bargaining history as an aid to interpretation.

AWARD:
The grievance succeeds. The Arbitrator is satisfied there is latent ambiguity and is prepared to accept bargaining history as assistance. With respect to interpretation, he finds that each of the three categories, seniority, ability, and qualifications, is to be analysed independent of the others. Where the score is relatively equal, seniority prevails. Job postings are by classification and not the specific position being sought within the classification. The criteria to be met by the successful applicant must be related to the classification in the first instance, however, the Employer is not bound to select the candidate who meets the minimum qualifications and then look to seniority. They are permitted to find the best candidate pursuant to the selection process. The selection process in this case did not categorize the scoring by the three categories independently.

DECISION: 99-028

Nova Scotia (Education & Culture) AND Nova Scotia Government Employees Union (NSGEU)

Kydd, William H. - Arbitrator

Raymond Larkin, for the Union

Sarah Bradfield, for the Employer

May 13, 1999

ISSUES:
Illness or disability - Burden of proof - Employer allegations 7:3250, Return to work 8:3342; - Medical examinations 7:3220, 7:3230; Return to work 7:3210, 8:3340; Human rights code - Discrimination 6:3360.

CIRCUMSTANCES:
The grievance arises from a termination of employment following a determination that the Employee would not be able to return to work for medical reasons and that the Employee was no longer eligible to receive long- term disability benefits. The Union asserts that the facts upon which the determination was made were wrong because the Employee's medical condition entitled him to continued eligibility in the LTD plan. The Employer claims that the Grievor was not eligible to be reinstated on LTD, and that his physician could not provide any evidence that he would ever be able to return to work and do his job effectively. They had concluded that operational demands precluded their accommodating the Grievor's limitations. A preliminary motion by the Employer that the issue concerned termination of LTD benefits, and not termination of employment, and that the time-limit for filing had expired had been rejected. The Employer has objected to all of the post termination medical evidence on the basis that it is not relevant.

AWARD:
The grievance succeeds. The Arbitrator concludes that post termination medical evidence, and medical evidence that was not known to the Employer, is relevant and admissible for the purpose of determining the Grievor's medical condition at the time of discharge. The question at issue is whether an Employer is entitled to terminate employment where they reasonably believe the entitlement to benefits no longer exists, but where such belief is later determined to be erroneous. The Arbitrator suggests that under the Human Rights Act, the LTD Board of Trustees probably have the authority to grant an extension, and that an appellant has the right to an extension if, during the appeal period, he was suffering from a mental condition that prevented him from responding within the time limits. The medical evidence indicates that the cause of his failure to participate in a rehabilitation program was due to his mental disability. The decision to terminate may be rescinded if it was shown to be based on an incorrect diagnosis of the Grievor's medical condition at the time of termination and the Employer is directed to reinstate the Grievor's employment so as to entitle him to receive the LTD benefits.

DECISION: 99-029

Holiday Inn, Harbourview AND Hotel Employees & Restaurant Employees International Union (HERE), Local 662

North, Gregory I. - Arbitrator

Ronald Stockton, for the Union

Matthew J. McPherson, for the Employer

May 18, 1999

ISSUES:
Schedules 5:3100; Working hours and shifts - Reasonableness 5:3100; Bargaining unit - Employees excluded 5:1120; Seniority - Shift assignment 6:2000; Management rights 4:2310.

CIRCUMSTANCES:
These two grievances allege that the Employer violated certain provisions of the Collective Agreement in relation to scheduling and shift assignment. One Grievor is a full-time Server who was fourth on the seniority list, and the other a part-time Server scheduled on an as-required basis. The Union submits that management has breached the Agreement on the evenings of the Dinner Theatre by performing work of members of the bargaining unit because of a failure to schedule sufficient numbers. They further suggest that senior employees are entitled to be given preference in available work shift assignments, including the opportunity to work shifts which will provide additional remuneration. The Employer argues that management has the discretion to make necessary scheduling decisions. Whether or not a particular shift may generate more gratuities than another is not a valid basis for the assignment of shifts.

AWARD:
The grievances fail. The present case does not deal with a change in schedules, but rather with the process used in establishing the normal weekly work schedule. The Arbitrator is satisfied that the Agreement permits management to work on an occasional basis to meet the demands of service. Management did not in fact take the place of a regular employee. Senior employees have first preference to work but that does not go so far as to allow staff to pick and choose among individual shifts based on whether they might result in more gratuities.

DECISION: 99-030

Guysborough County Home Support Agency AND Nova Scotia Government Employees Union (NSGEU)

Haynes, Ross H. - Arbitrator

Kimberley Turner, for the Union

Matt J. McPherson, for the Employer

October 30, 1998

ISSUES:
Travel allowance 8:3700; Procedure - Powers of board of arbitration - Preliminary objections 3:2100; Collective agreement - Ambiguity 2:2200, 3:4400; Matters arising outside of 2:1200; Interpretation - Words and phrases - Day or work day 4:2100, Measurement of time - Normal or regular hours 5:3100.

CIRCUMSTANCES:
As a result of regional health care consolidation in Nova Scotia, one agency was formed to provide home support service throughout the Guysborough County area under the Eastern Health Board. Prior to the Collective Agreement, some employees had been paid for travel time. At issue is whether the time necessary to travel from home to service the first client of the day, and at the end of the day to travel home from the last client, is to be included in the total hours of work. The Employer raised a preliminary objection that this matter is not appropriately the subject of a grievance.

AWARD:
The grievance succeeds. While the parties may have specifically failed to reference and define this issue within their Agreement, by its very nature, the Agreement refers to the concept of the working day. What the parties fail to do is set forth a clear understanding of what is to be the beginning and the end of the compensatable working day. It is clear that all the employees disburse from their homes to provide service throughout the community. The Arbitrator finds that for the purpose of this grievance, an Employee reports for work when they embark from their home to their first regularly scheduled appointment, and the working day ends when the Employee returns to their home from the last appointment.

DECISION: 99-031

Halifax Regional Municipality AND Municipal Assn. of Police Personnel (MAPP)

Outhouse, S. Bruce - Arbitrator

Ronald Pink, for the Union

Mike Christie, for the Employer

May 27, 1999

ISSUES:
Working hours and shifts 5:3100; Overtime 5:3200 - Call-in pay 8:3410; Defining overtime - Qualifying time 8:2130; Interpretation - Aids to interpretation - Dictionaries 4:2210; - Intention of the parties 4:2100.

CIRCUMSTANCES:
The Grievor is a Constable with the Halifax Regional Municipality Police Department. He received a subpoena for attendance at court and claims and for call-out pay, pursuant to the provisions of the Collective Agreement. The Union submits that court time scheduled outside of regular working hours falls under the call-out provisions. The Grievor was scheduled to report for duty at 3:00 p.m. The subpoena required him to be at court at 2:00 p.m. The Employer argues that a call-out occurs after an employee has reported off duty and before they are scheduled to report for duty. They maintain that the Constable had been served with a subpoena at least a month beforehand, which constitutes a scheduled assignment.

AWARD:
The grievance succeeds. The Agreement stipulates that all court time during off duty hours is to be treated as a call- out. The Grievor commenced his regularly scheduled shift at 3:00 p.m. Therefore, the 2:00 p.m. court appearance was during his off duty hours.

DECISION: 99-032

Kimberly-Clark (Nova Scotia) AND Communication, Energy & Paperworkers Union of Canada (CEP), Local 440

MacKeigan, Peter J. - Arbitrator

Raymond F. Larkin, for the Union

Eric B. Durnford, for the Employer

May 7, 1999

ISSUES:

Recall 6:2354; Job posting - Bona fides 5:2300; Criteria - Physical qualifications 6:3360; Illness or disability - Burden of proof - Return to work 8:3342; - Medical examinations 7:3220, 7:3230, 7:3250; Proof of recovery 8:3342; Reasonable accommodation 7:3220, 8:3340; Human rights code - Discrimination 6:3360.

CIRCUMSTANCES:

The Employer is a manufacturer of paper products. The Grievor claims that he was not recalled for the job posting in the Power and Recausticizing Pool, for which he was classified. The Grievor had been diagnosed as having paranoid schizophrenia. The Union argues that the failure of the Employer to recall the Grievor constitutes a prima facie case of discrimination on the grounds of disability, contrary to the Nova Scotia Human Rights Act. They did not fairly and accurately assess the nature and extent of any limitations he may have had, consider possible accommodations, or engage in a process inquiry. The Employer contends that the Grievor was not fit medically to perform the services required and, because he was still under active treatment at the Nova Scotia Hospital, the issue of accommodation does not apply. The work situation was too dangerous for him to return to at that time. There is no matter of discrimination as there was a bona fide need of a work requirement which could not be met.

AWARD:

The grievance fails. The evidence can essentially be broken down into three components. The first relates to the nature of the workplace and the job functions which would have been performed. The second relates to expert medical evidence as to the nature of paranoid schizophrenia and the treatment process. The third relates to the discussions between the medical caregivers, the Union, and management regarding aspects of accommodation. The essential issue is the fitness of the Grievor to return to work. The Arbitrator is satisfied that the Doctor's physical examination was reasonably conducted, and there is no reason why his conclusions that the Grievor was not physically fit for this workplace and specific job should not be accepted. The Grievor could not be accommodated due to the unstable nature of his treatment, which carried with it significant risk to himself and to others, and the serious financial consequences of an accident which would create undue hardship on the part of the Employer.

DECISION: 99-033

Georgia Pacific Corp. AND International Union of Operating Engineers (IUOE), Local 721B

MacDougall, R. Lorne - Arbitrator

Ronald A. Pink, for the Union

John H. Graham, for the Employer

May 25, 1999

ISSUES:
Work assignment 5:1000 - Fairness 4:2300; Working hours and shifts - Reasonableness 5:3100; Transfer between shifts 5:2000; Fairness - Management duty to act fairly 4:2320; Management rights 4:2310.

CIRCUMSTANCES:
The Grievor has worked as a Labourer for this Employer for thirty-five years. He alleges that the requirements of a shift change are unreasonable and that he has been subject to discrimination and harassment. The Union claims that the Employer has failed to meet the obligation to be reasonable and non-arbitrary.

AWARD:
The grievance fails. The Arbitrator agrees with the Employer that the unreasonable requirements in the Collective Agreement refer to job requirements and not to shift changes. However, this does not affect the burden on the Employer to exercise his discretion reasonably and in good faith. The primary reason for the shift change was to settle employee problems that arose from time to time between the Union and the Employer. There was no evidence which supported a finding of either discrimination or harassment by the Grievor, nor was the action of the Employer intended to be punitive. The Grievor's position was taken into consideration by the Employer and found not to be sufficient reason to revert to the Grievor's former shift when balanced against the Employer's interests.

SEE ALSO:
98-049

DECISION: 99-034

Trenton Works Ltd. AND United Steelworkers of America, Local 1231

MacDougall, R. Lorne - Arbitrator

N/A, for the Union

N/A, for the Employer

April 27, 1999

ISSUES:
Expedited arbitration - Single arbitrator 3:1100.

CIRCUMSTANCES:
This is an expedited arbitration. Five cases were heard pursuant to the agreed rules for expedited arbitrations prepared by both Employer and Union representatives.

AWARD:
Two grievances succeeded and three failed. The Arbitrator was called upon to render a decision in each case stating simply whether each is accepted or denied. No further details were given.

DECISION: 99-035

Levatte Construction Co. Ltd. AND International Union of Operating Engineers (IUOE), Local 721

MacKeigan, Peter J. - Arbitrator

Kenneth Estabrooks, for the Union

Robert D. Levatt, for the Employer

[June 7, 1999]

ISSUES:
Collective agreement - Form and content - Pension, insurance and welfare plans 4:1400; Union - Compliance with collective agreement - Check off 9:1200.

CIRCUMSTANCES:
The grievance alleges that the Employer failed to remit dues and benefit contributions to the

appropriate funds for a six-month period, in violation of the terms of the Collective Agreement.

AWARD:
The grievance succeeds. A consent award is granted in favour of the Union and the Employer is directed to remit all outstanding dues and benefits.

DECISION: 99-036

Nova Scotia (Education & Culture) AND Nova Scotia Teachers' Union (NSTU)

Christie, Innis - Arbitrator

Lorraine P. Lafferty, for the Union

Eric Durnford, Bernadine MacAulay, for the Employer

June 10, 1999

ISSUES:
Wages 8:1000 - Increases - Progressive wage increases 8:2320; Interpretation 4:2000, 4:2100, 4:2300 - Aids to interpretation - Dictionaries 4:2210, Prior awards and court decisions 1:3000, 4:2220, Statutes 4:2230; Statutes - Aid to interpretation 4:2230 - Applied by boards of arbitration 1:5400, 2:2100.

CIRCUMSTANCES:
The grievance involves the decision of all School Boards in Nova Scotia to refuse payment at the salary levels set out in Schedules of the Collective Agreement following the end of the effect of the Public Sector Compensation (1994-97) Act. The issue is whether teachers' experience-based salary increments provided for in the Agreement, and denied them for the school year 1994-95, are lost not only during the period the Act was in force, but also as the basis on which their salaries after October 31, 1997 are to be determined. According to the School Boards, their teachers permanently lost one year of experience. The Union claims that upon the expiry of the Act, teachers became entitled to be paid their increments based on actual years of teaching experience. The Employer responds that the Section is not time limited in its effect.

AWARD:
The grievance succeeds. There is nothing in the Agreement or the evidence to say whether a 3% increase was treated by the parties as the return of the rollback effected by the Act, or simply a negotiated increase. The Arbitrator agrees with the Union that on the face of the Agreement, increments are to be paid based on actual year of teaching without regard to the legislated cancellation of increments. The Halifax Regional School Board is ordered to pay all affected teachers any pay owing to them. The parties have agreed that this award will determine the

obligations of all School Boards in Nova Scotia.

SEE ALSO:
99-036. A, 99-036. B

DECISION: 99-036. A

Nova Scotia (Education & Culture) (Applicant) AND Nova Scotia Teachers' Union (NSTU) (Respondent)

Honourable Justice Davison

Lorraine Lafferty, for the Union

Eric Durnford, for the Employer

January 27, 2000

ISSUES:
Judicial review - Standard of review of arbitral interpretation 1:5400; Interpretation - Aids to interpretation - Prior awards and court decisions 1:3000.

CIRCUMSTANCES:
This is an application by the Employer for judicial review and to set aside the award of Arbitrator Innis Christie, dated June 10, 1999. The Court must decide if the issue put before the Arbitrator was resolved correctly. The issue before Arbitrator Christie was whether the experience-based salary increments, provided in the Collective Agreement and taken away by the Public Sector Compensation Act (1994-97), were still removed after the Act ceased. The Arbitrator found that the Act was not intended to have effect after November 1, 1997, and that the Collective Agreement that existed between the parties when the Act came into effect was restored, including the experience-based salary increments. The Employer argues that the Court should interpret the 1994 Act using the "plain meaning" rule. The Employer also argues that the Nova Scotia Court of Appeal decision Nova Scotia Government Employee's Union v. Q.E. II Health Sciences Centre (1998) should not bind the Court currently, as it only applies to a section of the Act that is of no concern in this issue; that those opinions relied upon by the Arbitrator are "obiter dicta," unnecessary for the decision, or incidental.

AWARD:
The application fails. The Court finds that the Arbitrator was correct in allowing the grievance and directing the School Board to pay all affected Teachers as instructed. Further, the Court finds the Court of Appeal opinions it was asked to ignore were a result of the interpretation of the statute as a whole, and further that this Court would have been bound to follow the findings made by the Court

of Appeal even if this Court had failed to agree with those findings, which it did not. Costs are granted to the Union in the amount of $1,000.

SEE ALSO:
99-036, 99-036. B

DECISION: 99-036. B

Nova Scotia (Education & Culture) (Appellant) AND Nova Scotia Teachers' Union (NSTU) (Respondent)

Flinn, Chipman, and Cromwell, JJ.A.

Eric Durnford, for the Union

Lorraine Lafferty, for the Employer

May 17, 2000

ISSUES:
Wages 8:1000; Wages - Increases - Progressive wage increases 8:2320; Interpretation 4:2000, 4:2100, 4:2300; Interpretation - Aids to interpretation - Dictionaries 4:2210; Interpretation - Aids to interpretation - Prior awards and court decisions 1:3000, ; 4:2220; Interpretation - Aids to interpretation - Statutes 4:2230; Statutes - Aid to interpretation 4:2230; Statutes - Applied by boards of arbitration 1:5400, 2:2100.

CIRCUMSTANCES:
This is an appeal of the decision of the Honourable Justice John M. Davison upholding the award of Arbitrator Innis Christie.

AWARD:
The appeal is dismissed. The Court finds that Arbitrator Christie did not err in allowing the Respondents' grievance. To accept the Appellant's position would be to give the Public Sector Compensation Act (1994-1997) a lingering effect which it was never intended to have. The Appellant will pay the Respondent its costs of this appeal.

SEE ALSO:
99-036, 99-036. A

DECISION: 99-037

Halifax Regional School Board AND Nova Scotia Union of Public Employees (NSUPE), Local 2

Connors, Lynn M. - Arbitrator

Nancy Elliott, Ron Stockton, for the Union

Ian C. Pickard, for the Employer

June 25, 1999

ISSUES:
Vacancy 5:2510; Job posting 5:2520; Time-limits - Restriction on arbitrability 2:1100; Arbitrability - Agreement expired 4:1620; Mootness 2:1200.

CIRCUMSTANCES:
A grievance was filed concerning staffing at each location after the Dartmouth and the Halifax School Boards were amalgamated into the Halifax Regional School Board. The Employer Board changed certain Caretakers to the position of Building Superintendent. and the Caretaker positions were not filled. The Employer alleges that both grievances were moot, because of the passage of time and the existence of a new Collective Agreement, and that the Arbitrator had no jurisdiction to hear them. They argue that there no longer exists an obligation to continue the same number of members in the bargaining unit.

AWARD:
The grievance succeeds. The Arbitrator accepts the position of the Union that there is no jurisdiction to consider the relevant sections of the new Agreement. As well, there is an ongoing violation of both Agreements due to the reduced number of positions and/or employees. The Arbitrator's jurisdiction arises under the old Agreements under which the grievances were brought. It is clear that there was a violation of the Dartmouth Agreement. In relation to the Halifax grievance, it is less factually clear as to how many positions existed at any one time. As a result of the school closures, the positions were reduced from 107 to 104, and the cap of 104 cannot be reduced any further unless there are extraordinary circumstances. The Arbitrator orders a declaratory judgment that the Board was in violation of the relevant provisions of the Agreement and, if there is a provision contained in it which would cover the posting of the Caretaker positions, then it is ordered that those positions be posted.

DECISION: 99-038

Nova Scotia (Education & Culture) AND Nova Scotia Government Employees Union (NSGEU)

Veniot, Milton J. - Arbitrator

David J. Roberts, for the Union

Dale A. Darling, for the Employer

June 28, 1999

ISSUES:

Discipline and discharge - Grounds for - Failure to get along with work mates 7:3580, Fighting or threatening 7:3430, Refusal to obey instructions 7:3610; - Prior record 7:4310, 7:4314; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000; - Culminating incident 7:4310; Mitigating factors 7:4400 - Apology 7:4422, Economic hardship 7:4426, Employment record 7:4428, Personal or emotional problems 7:3430; Evidence - Admissibility - Relevance 3:4200; Human rights code - Discrimination 6:3360.

CIRCUMSTANCES:

The Grievor worked as a Secretary to the Director of Records Management in the Public Archives Administration Office. She had been a full time employee of the Province for seventeen years. She was dismissed because of allegations that she threatened co-workers. The events were seen as culminating incidents of employee misconduct leading to the dismissal. The Grievor is seeking reinstatement and compensation for lost wages. The Employer argues that certain medical evidence related to the Grievor's condition is post-termination evidence and is inadmissible.

AWARD:

The grievance succeeds. The Grievor intended by her words to threaten and alarm her co-worker, her immediate superior, and the Acting Director of Human Resources. The Arbitrator considers all of the medical evidence to be properly admissible as the opinions were formed during the period of employment. The Employer acted properly in regarding the event as a culminating incident. A lack of commonality is not reason to ignore the previous disciplinary record. However, the Arbitrator finds that the penalty of dismissal was too severe. In addition, there were a number of mitigating factors including the Grievor's illness, together with a lack of intention to carry out threats, acknowledgement of wrongdoing, seniority, and an adverse economic impact. The Grievor will have a time served suspension and be reinstated, effective one week from the date of the award. She will continue to accrue her seniority during the suspension. There was no compensation order.

DECISION: 99-039

Scotsburn Dairy Group AND Bakery, Confectionery & Tobacco Workers' International Union (BCT), Local 446

DeMont, Eric G. - Arbitrator

Rene Quigley, for the Union

R. Malcolm MacLeod, for the Employer

June 28, 1999

ISSUES:

Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612, Theft 7:3310, 7:3312, 7:3314, Work performance - Culpable incompetence 7:3510; Disciplinary penalties - Culminating incident 7:4310 - Theft 7:3314; - Types of penalties - Multiple penalties 7:4240; - Warning 7:4416.

CIRCUMSTANCES:

The Employer produces and distributes dairy and related products. The Grievor was employed as a Driver Salesman working out of the Company's facility in Bridgewater. He was dismissed due to findings of misuse of Company funds and a direct refusal to obey orders. This followed a suspension because of deficiencies in job performance, and a pattern of deceit to cover up work related problems. The Union argues that any evidence relating to incidents prior to the Grievor's suspension should be excluded. The Employer responds that the incident of the missing deposits is a sufficient culminating incident for the prior record to become relevant.

AWARD:

The grievance fails. The Arbitrator finds that the Employer's evidence is more credible than that of the Grievor. The failure of the Grievor to make deposits was an appropriate culminating incident, justifying dismissal and, in the alternative, it amounted to a misuse of Company funds which by itself is grounds for immediate dismissal.

DECISION: 99-040

Western Regional Health Board AND Nova Scotia Nurses' Union (NSNU)

Christie, Innis - Arbitrator

Leanne MacMillan, for the Union

John K. Poirier, for the Employer

July 12, 1999

ISSUES:
Overtime - Call-in pay 8:3410, Premiums 8:2140; Interpretation - Context 4:2100, 4:2300; Statutory holidays - Holiday pay and other benefits - Holiday pay and overtime 8:2140.

CIRCUMSTANCES:
The Grievor has been a Registered Nurse for sixteen years and works at the Yarmouth Regional Hospital on a full time basis in the Outpatient/Emergency Department. She claims she was not compensated for work performed after being called in to work with less than 72 hours notice. The Employer's position is that the Grievor should have been paid two times her straight time rate of pay for 11.25 hours plus be permitted to take 7.5 hours off at a later date. The Union argues that she should be permitted to take 11.5 hours off at a later date. The intention was to provide a premium benefit for being called in on short notice on a Holiday upon which the Nurse was not scheduled to work.

AWARD:
The grievance succeeds. The Arbitrator determines that a Nurse who is called in on less that 72 hours notice to work on a Holiday on which he or she is scheduled off is to be paid double time and is to be given the same number of hours off at a later date that were worked on the call-in shift. The Grievor worked 11.25 hours but was given only 7.5 hours off. Therefore, the Employer is to grant her an additional 3.75 hours of paid holiday time or compensate her for not having done so.

DECISION: 99-041

Surrette Battery Co. Ltd. AND International Brotherhood of Electrical Workers (IBEW), Local 625

MacKeigan, Peter J. - Chair; Cooke, Robert; Simpson, Carl

Fern J. Tardif, for the Union

Glenn Hall, for the Employer

June 4, 1999

ISSUES:
Wages - Union business 9:1400; Union - Officials 9:1500 - Conducting business on company time 9:1400.

CIRCUMSTANCES:
The parties held a previous hearing respecting the policy grievance of the Union as to the interpretation of provisions of the Collective Agreement relating to shift work and classifications. The Grievor, in his capacity as Shop Steward, was in attendance at that hearing. The Employer refused to pay his wages for that date. The Union argues that the Shop Steward is paid for attendance at meetings to help resolve matters during the grievance process, and that the arbitration is part and parcel of the process. Under the Collective Agreement, there shall be no discrimination by the Employer against the Shop Steward in the performance of his duties. The Employer contends that the Agreement provides that payment of wages be made during the normal working hours of the grievance process. The section that relates to arbitrations specifically does not make reference to payment of wages to the Shop Steward. Once the parties move to a formalized arbitration process, the Shop Steward takes on a more adversarial role. It would be inappropriate to suggest that his salary should be paid in that situation.

AWARD:
The grievance succeeds. The Agreement provides that the Company and the Union will bear the cost of their respective representative and will share the cost of the Chair of the arbitration equally. Arbitration is an essential part of the dispute resolution process. The legal authorities suggest a grievance does not terminate when an arbitration panel is founded, and that the grievance exists until the matter is ultimately concluded. It appears from the terms of this Agreement that the parties did not intend there to be a distinction between the handling of a grievance and attendance at a meeting respecting payment of wages to the Shop Steward. The Grievor is awarded his wages for the lost time during the working hours of the previous arbitration hearing.

DECISION: 99-042

Northwoodcare Inc. AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 4606

Scaravelli, Nicoll M. - Arbitrator

Garry Murray, for the Union

Robert Dunn, for the Employer

July 16, 1999

ISSUES:
Lay-off 6:2200; Contracting out 5:1300.

CIRCUMSTANCES:
The Employer operates a Home for Special Care in Halifax. The grievance relates to the lay-off of two employees, an Upholsterer and a Carpenter. As a result of a change in the financial picture, the Employer decided to reduce operational costs. The decision to downsize and the commencement of renovation work at the Manor were not related. The issue is whether the Employer violated the Collective Agreement by contracting out work that resulted in the Grievors being laid off. The Employer argues that the process which led to contracting out was underway well before the lay-off.

AWARD:
The grievance succeeds. The Union did not dispute the Employer's position that it made a bona fide decision to lay- off as a result of on overall plan to reduce operational costs. However, the fact that the Employer based its decision on economics does not permit it to contravene the provision of the Agreement. The work contracted out included work normally performed by the Grievors. The timing was such that it resulted in the simultaneous removal of the Grievors, and passing of their work to an outside contractor.

DECISION: 99-043

University College of Cape Breton AND University College of Cape Breton Faculty Assn. of University Teachers

Warner LaForest, Anne - Chair; D'Orsay, John; McKenzie, Jan

Maureen Webb, for the Union

Eric Durnford, for the Employer

May 4, 1999

ISSUES:
Adjournments 3:2300.

CIRCUMSTANCES:
This grievance concerns the Employer's decision to deny tenure to the Grievor. The Union has requested an adjournment, arguing that it was too recently advised that the Employer would be taking the position that the grievance is inarbitrable. The Union claims that given the arbitration history of the parties the Employer's decision to argue inarbitrability is "unfair surprise" and would be grossly prejudicial to the Grievor to have to proceed with the hearing at this time. The Employer argues that arbitrability and jurisdiction are part of any arbitration proceeding and that the Union, in this case, had reason to anticipate the Employer's concern. Further, the Employer argues that the Letter of Understanding is clearly a Collective Agreement and therefore the Board has no jurisdiction to deal with the substance of the case, and to prolong the matter with an adjournment will cost the Employer even more time and money than has already been spent.

AWARD:
The request for adjournment succeeds. The prejudice that will arise for the Grievor when the Union counsel is unprepared tc proceed warrants the granting of an adjournment. The Board is mindful that time is a factor for the parties and ask that new hearing dates be set up as soon as possible.

SEE ALSO:
99-043. A

DECISION: 99-043. A

University College of Cape Breton AND University College of Cape Breton Faculty Assn. of University Teachers

Warner LaForest, Anne - Chair; D'Orsay, John; McKenzie, Jan

Maureen Webb, for the Union

Eric Durnford, for the Employer

July 6, 1999

ISSUES:
Jurisdiction - Sources - Collective agreement 2:1200.

CIRCUMSTANCES:
The Employer submitted that the grievance is not arbitrable because the subject of the grievance is not a matter covered by the Collective Agreement. The Union conceded that, without the Employer's agreement, the arbitration board has no jurisdiction to hear this grievance on its merits. This concession was made without prejudice to any agreement the parties might reach for the arbitration of this case on its merits in the future.

AWARD:
The grievance is dismissed for lack of jurisdiction.

SEE ALSO:
99-043

DECISION: 99-044

ABT Canada Ltd. AND Communication, Energy & Paperworkers Union of Canada (CEP), Local 434

Veniot, Milton J. - Arbitrator

Leanne MacMillan, for the Union

Lynn M. Walsworth, for the Employer

July 21, 1999

ISSUES:
Discipline and discharge - Theft 7:3310, 7:3312, 7:3314; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000.

CIRCUMSTANCES:
The Grievor was employed as a Millwright or Industrial Mechanic at a wood processing facility located near Chester. He was dismissed from his employment for theft of the Employer's property. He had removed returnable soft drink cans and some copper tubing from the plant.

AWARD:
The grievance succeeds. The penalty imposed is excessive. The Employer's explicit policies with respect to theft and vandalism had been clearly communicated to the Grievor, but a specific dismissal penalty has not been negotiated in the Collective Agreement. The offence is serious and the Grievor's act was clandestine and calculated to avoid detection. However, he is a medium term employee with a fairly good disciplinary record and has shown genuine remorse and contrition over the act. The goods were worth only a small amount. The Arbitrator believes this employee can be rehabilitated to a productive employment relationship. A just and reasonable penalty is a time-served suspension and the loss of 50% of the Grievor's seniority.

DECISION: 99-045

Trenton Works Ltd. AND United Steelworkers of America, Local 4253

MacKeigan, Peter J. - Arbitrator

John Kingston, for the Union

Ian C. Pickard, for the Employer

July 19, 1999

ISSUES:
Job posting 5:2520, 6:2310 - Bona fides 5:2300; Criteria 6:3300; Seniority 6:0000; Interpretation 4:2000, 4:2100, 4:2300; Evidence - Burden of proof 3:2400; Management rights - Job standard 4:2310.

CIRCUMSTANCES:
The grievance relates to a job posting for the position of Senior Materials Expediter at Trenton Works Ltd., a heavy industrial manufacturer of railway boxcars. The parties acknowledge that there is ambiguity in the Collective Agreement about the use of the term 'education' and seek clarification. The Grievor claims to have seniority for the position, but the Employer determined that she did not meet the minimum requirements under the Collective Agreement. The Union argues that the Employer failed to prove the Grievor is inadequate but the Employer states that the burden of proof rests with the Union. The Union also argues that the revised job description should not have been used because the Union had not signed off on these changes.

AWARD:
The grievance fails. The Arbitrator finds that the word "education" was inserted in error for "evaluation" in the Agreement. He also determines that the duties of the job did not change and that the essential issue is the question of experience in expediting procedures. He is not satisfied that the experience of the Grievor is of the type required for this position. It is the Employer's right to determine job requirements and there is not sufficient evidence to suggest that they did not act reasonably in either setting the requirements for the posting or the process followed.

DECISION: 99-046

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

Jeff Woods, for the Union

Joanne Harrington, for the Employer

July 26, 1999

ISSUES:

Discipline and discharge - Grounds for - Unlawful strike 9:2410; - Just cause - Other standards 7:1300; - Procedural limitations on discipline 7:2100; Non-suit 3:2640; Disciplinary penalties - Notice 7:2100; Progressive discipline 7:4422; Strikes and lockouts - Unlawful strikes - Discipline 9:2410; Overtime - Voluntary 7:3632.

CIRCUMSTANCES:

These are grievances on behalf of approximately 627 employees claiming that the Employer imposed disciplinary suspensions on them for allegedly participating in an illegal strike. The Union agreed that there had been a 2-day work stoppage by employees, that the Canada Labour Relations Board had found it to be an illegal strike and had issued a cease and desist order, and that the strike was in fact illegal. They do not agree that the Grievors participated in the illegal strike and put the Employer to the strict proof of the just, reasonable and sufficient cause for discipline of each of them individually. The Union also requested a finding of non-suit based on the Employer's lack of evidence. The Employer submits that this strict individual proof approach is contrary to the Regular Arbitration Procedure. A second issue is whether each of the Grievors received written notice beforehand.

AWARD:

The grievances fail in part. The Arbitrator ruled on the procedure to be followed as set out in a preliminary award. He held that the Union could only have a ruling on a motion of non-suit if it were not going to call any evidence and the motion was not made. Except for one case, the Grievors received the notice required. Employees must take individual responsibility for participation in an illegal strike. However, the Agreement makes no allowance for dealing with individual discipline. The Arbitrator feels that the suggestion that the Employer had to prove in each case, not only that each Grievor was not at work during the illegal strike, but also that the Grievor refused to report to work and/or process the mail, goes beyond what is reasonably or normally required. The onus rests on employees who fail to report for work during the course of a strike to establish that they did not have the required intent to withhold their services in concert with a common understanding. Where an employee is absent from work, it is entirely reasonable, to assume that he or she is participating in the strike. The Employer has proved that it complied with the notice requirement and that it had just reasonable and sufficient cause individually for the discipline imposed on each of the Grievors.

Exceptions in specific cases are noted. All discipline for one grievor was recinded and compensation granted. Other grievors received a reduction in the suspension period.

DECISION: 99-047

Shannex Inc. (Breton Bay Nursing Home) AND Canadian Union of Public Employees (CUPE), Local 1183

Archibald, Bruce P. - Arbitrator

Blaise Macdonald, for the Union

Sarah MacDonald, for the Employer

July 30, 1999

ISSUES:
Grievance - Group grievance 2:3120, 2:3126; Policy grievance 2:3120, 2:3124; Disciplinary penalties - Discriminatory 7:4414; Company rules 4:1500 - Reasonableness 4:2300; Promotion, demotion and transfer - Demotion or transfer - Disciplinary 7:3544, Fairness 4:2300; Absenteeism 7:3110, 7:3112, 7:3544.

CIRCUMSTANCES:
This is an arbitration dealing with a number of grievances which arose from the implementation of an Attendance Management Program at the Breton Bay Nursing Home owned by Shannex Inc. The Union entered a Policy Grievance, Group Grievance and Individual Grievance. They claim that the Absentee Control Policy of the Employer is contrary to the terms of the Collective Agreement and discriminatory. It was never brought in adequate fashion to the attention of the employees before the Employer purported to act upon it, is disciplinary in its content and application and is an unreasonable application of management powers.

AWARD:
The grievance succeeds in part. The Arbitrator concludes that the Program is not on its face, or by necessary implication, a discriminatory measure contrary to the Agreement. What evidence there is supports the inference that the employees were aware of the existence of the policy and its major tenets. The Policy is not on its face essentially disciplinary in nature, and it does make an appropriate distinction between culpable and non-culpable absenteeism. The Union has not demonstrated that the Program is in breach of a reasonable standard for the exercise of management rights under sections of the Agreement or provincial human rights legislation. The Employer does have an obligation to enforce its policies and rules in an appropriate and even- handed manner, with full attention to the circumstances relevant to each employee. It has recognised that it erred in three cases and has taken steps to rectify these errors. No remedy, other than this declaration is required.

DECISION: 99-048

IMP Aerospace Components Ltd. AND United Steelworkers of America, Local 4883

Outhouse, S. Bruce - Arbitrator

Cal Luedee, for the Union

Ronald Campbell, for the Employer

August 16, 1999

ISSUES:

Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612, Uncooperative behaviour 7:3360; - Obey now grieve later 7:3610 - Exceptions 7:3620; Job classifications and descriptions - Creation or revision 5:2440 - Change of work load/job function 5:2410, Wage structure 5:2400, 5:2420; Interpretation 4:2000, 4:2100 - Aids to interpretation - Ancillary documents 4:1200; Estoppel 2:2200; Negotiating history 3:4420; Past practice 3:4430; Rectification - Board of arbitration 2:1440; Management rights - Job standard 4:2310; Discrimination - Discipline - Onus 7:4414.

CIRCUMSTANCES:

The Grievor alleges that he was unjustly suspended for three days because he refused to perform work which he believed fell within the exclusive purview of the CNC Analyst. He claims also that he was improperly classified and paid as a CNC Brake Operator. As a result of modernization, a Computer Numerical Control Router was introduced which resulted in the establishment of two new classifications - namely, CNC Analyst and CNC Router Operator. The Grievor has been primarily responsible for all aspects of the CNC brake since its inception. It is his opinion that a lot of the main functions of CNC Brake Operator are similar to those of an Analyst. He takes the position that programming was not part of his job description, but he would be content to do it if he was transferred into an Analyst's position. The Union invokes the doctrine of estoppel saying that the Grievor has already been doing the programming for the CNC brake. They also contend that the Employer discriminated against the Grievor because he was an active member of the Union executive. The Union maintains that the CNC Router/CNC Brake Operator classification and wage rate which appears in the current Collective Agreement was never in fact negotiated by the parties. The Employer emphasizes that an Appendix contains the classification. It is open to management to establish new classifications and where the Union disagrees, they must deal with the matter in the next round of collective bargaining.

AWARD:

The grievance fails. The work now, grieve later principle applies in the present case. The Grievor declined to complete certain work orders, because they involved programming the CNC brake, saying that programming was not within his job description. His refusal was a deliberate attempt to force the issue of whether he should be classified and paid as an Analyst. He was not treated in

a discriminatory manner. His refusal constituted a form of insubordination which rendered him liable to discipline and the penalty imposed was just and reasonable in the circumstances. The classification and wage rates had not been finalized and were subject to further negotiation. In these circumstances there is no basis to apply the doctrine of rectification to the collective agreement. On the classification issue, it would appear from the evidence that the Grievor is not performing the core functions of an Analyst.

DECISION: 99-049

Clearwater Arctic Surf Clam Inc. AND United Steelworkers of America, Local 596

MacDonald, David J. - Chair; Kingston, John; McDougall, Donald H.

N/A, for the Union

N/A, for the Employer

July 26, 1999

ISSUES:
Discipline and discharge - Grounds for - Absence from work - Reasonable excuse 7:3112; Illness or disability - Employer response - Alternatives to termination - Absenteeism 7:3200, 7:3210, 7:3220, 7:3240, Inability to work properly 7:3220; - Medical examinations 7:3220.

CIRCUMSTANCES:
The Grievor worked as a Clam Processor. Her position was terminated because she was absent without leave for three consecutive days or more without a reasonable excuse. She had been diagnosed with tendonitis in the right forearm and it was anticipated she would be off work for six weeks. When she attempted to resume work, she had a return of all her symptoms. The Employer facilitated her return to work by making available alternate employment in the Cold Room. Her claim for compensation had been closed.

AWARD:
The grievance succeeds. The Employer's assessment was factually incorrect and its decision improperly based. The Grievor was unable to return to work because of the pain and discomfort of a repetitive strain injury which she had initially incurred at work, and which had been aggravated by two prior attempts at returning to work. She was receiving ongoing medical assessment and treatment, and had been diagnosed by her physician as completely disabled for work at the Clam Plant. The termination letter is rescinded.

DISSENT:
(McDougall) The Grievor should have given the special light duty work a try.

DECISION: 99-050

Highliner Foods Inc. AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 1944

Christie, Innis - Arbitrator

Larry Wark, for the Union

David E. Reid, for the Employer

July 29, 1999

ISSUES:
Resignation 7:7100.

CIRCUMSTANCES:
This grievance involves the discharge of an Employee. The Union alleges that the discharge breached Article 6.07 of the Collective Agreement: "Any discipline or discharge shall be for just cause." Undisputed testimony describes the Grievor taking offence at a meeting and storming out. In passing through the plant, the Grievor slapped a member of management, her estranged husband. This arbitration seeks to determine if the Grievor effectively resigned by her actions, and if not, if she was dismissed with just cause. The Arbitrator notes that the Grievor had just returned to work from maternity leave after giving birth to her first child in emotionally difficult circumstances, and has been a good worker with a clear record.

AWARD:
The grievance succeeds. The Grievor's behaviour does not constitute resignation. Striking a supervisor is normally a very serious matter which may constitute just cause for discharge. In these circumstances, however, discharge was clearly not justified. The Arbitrator ordered the Grievor reinstated. The Parties reached agreement with respect to the remedy: the Grievor will not return to work with the Employer, but will receive some compensation, and will have any suggestion that she was discharged for just cause removed from her record of employment with the Employer.

DECISION: 99-051

Cape Breton Health Care Complex AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Locals 4600 & 4603

Outhouse, S. Bruce - Arbitrator

Victor Tomiczek, for the Union

Raymond Kuszelewski, for the Employer

September 8, 1999

ISSUES:
Collective agreement - Binding effect - Determination of 4:0000; Arbitrability - Agreement as primary source of jurisdiction 2:1100, 2:1200; - Existence of collective agreement 4:1000.

CIRCUMSTANCES:
The issue in this case is whether or not Monday, August 3, 1998 was a statutory holiday for the Union's members. During 1997 negotiations, it was agreed that the first Monday in August would replace the second Monday in June, Miners Memorial Day (Davis Day), as a statutory holiday in the new Agreement. The Employer treated Davis Day in 1998 as a statutory holiday, the predecessor agreements being in effect, and did not treat August 3, 1998 as a statutory holiday. The Employer argues that the Arbitrator is without jurisdiction to enforce the provisions of the current Agreement, because it was not in effect at the time the grievances arose. The Employer states that the present Collective Agreement did not come into effect until it was signed on August 24, 1998. In the alternative, the Employer argues that it was incumbent on the Union, if it felt that the Collective Agreement should have been signed sooner than it was, to have brought a complaint before the Labour Relations Board, pursuant to Section 36(1) of the Trade Union Act. The Union argues that the current Collective Agreement became effective on the date it was ratified by the Union's membership, July 8, 1998. The Union contends that the Employer purposely delayed signing the Agreement in order to avoid having to bear the cost of the August 3, 1998 statutory holiday. The Union denies that any substantive changes were made in the Tentative Agreement after July 8, 1998.

AWARD:
The grievance fails. The definition of collective agreement set forth in Section 2(1)(e) of the Act is of pivotal importance. It requires that a collective agreement be "a signed agreement in writing". In this case, the Tentative Agreement was in writing; however, it was not signed, and did not contain any mark remotely resembling a signature. In the present case, there were continuing discussions and correspondence, following ratification, about changes in the draft Agreement. The parties in this case did not evidence any degree of certainty that the new Collective Agreement came into effect prior to it being signed on August 24, 1998, and apart from isolated incidents, the predecessor agreements were being applied until that date. Apart from legalities, it is reasonably clear that the

remedy sought by the Union is at variance with the substance of the bargain struck by the parties during negotiations, being Davis Day would be replaced by the first Monday in August. The current Collective Agreement did not come into existence until it was signed on August 24, 1998, and the members of the bargaining unit were not entitled to a paid holiday on August 3, 1998 unless, in the case of the former employees of Sydney City Hospital, such entitlement arose under a predecessor agreement.

DECISION: 99-052

Halifax Shipyard AND Industrial Union of Marine & Shipbuilding Workers of Canada, Local 1

Darby, Peter E. - Arbitrator

Les Holloway, for the Union

M. Ross Langley, for the Employer

August 30, 1999

ISSUES:
Evidence - Standard of proof 3:2500; - Circumstantial evidence 3:5100; Discipline and discharge - Grounds for - Damage to employer's property 7:3410; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000, - Scope 7:4100.

CIRCUMSTANCES:
The Grievor was discharged from his employment as a Burner with Halifax Shipyard. He was discharged for committing three disciplinary violations, and therefore breaching his Re-employment Agreement. Any of the three violations was cause for discharge under the Re-employment Agreement. The Employer argues that the Re-employment Agreement was in effect, since the 2000 hour probationary period was not over, and subsequently the Arbitrator has only to determine whether the Grievor committed any of the three named violations. Further, the Employer argues that because the Grievor had committed a "major" offence under Schedule "B" of the Collective Agreement, which is a "specific penalty" within the exception to the operation of Section 43(1)(d) of the Trade Union Act, the Grievor is liable to dismissal under the Re-employment Agreement or under the Collective Agreement. The Union argues that the Grievor did not commit any of the three violations, but if it was found that he did, that the Grievor had completed the probationary period described in the Re-employment Agreement, empowering the Arbitrator, pursuant to Section 43(1)(d) of the Trade Union Act, to consider some penalty other than discharge.

AWARD:
The grievance fails. The Arbitrator is satisfied, based on the testimony of the Grievor himself, and on the testimony of the Stage Builder, that the Grievor committed a major breach of the Employer's

safety rules. The Re-employment Agreement was found to be in effect, and even if it hadn't been, the penalty language of both Schedule "B" of the Collective Agreement and paragraph four (4) of the Re-employment Agreement was found to be a "specific penalty" under Section 43(1)(d) of the Trade Union Act, preventing the Arbitrator from considering some penalty other than dismissal. The Employer had just cause to dismiss the Grievor because the Grievor committed a major offence and a minor offence. Because of paragraphs 4 and 5 of the Re-employment Agreement, the Arbitrator, again, was not entitled to consider some "other penalty" under Section 43(1)(d) of the Trade Union Act.

DECISION: 99-053

Cape Breton Regional Municipality AND Canadian Union of Public Employees (CUPE), Local 759

MacLellan, J.A. - Arbitrator

Blaise MacDonald, for the Union

Karen Oldfield, for the Employer

September 9, 1999

ISSUES:

Discipline and discharge - Grounds for - Alcoholic beverages 7:3560, - Criminal charges 7:3424, - Work performance - Culpable incompetence 7:3510; Consensual arbitration - Standard of review 1:5100; Evidence - Admissibility - Relevance 3:4200, Rules of evidence 3:4100; Arbitrability - Agreement as primary source of jurisdiction 2:1100, 2:1200.

CIRCUMSTANCES:

The purpose of this case is to determine whether the suspension and dismissal of the Grievor was justified. On August 21, 1997 the Grievor was employed as a Bus Driver for the Employer, and was driving a charter bus transporting between 39 and 41 passengers. As a result of receiving a complaint, the R.C.M.P. apprehended the Grievor, who was then a passenger in another bus. The Grievor agreed to take a Breathalyzer, and was charged under the Criminal Code with failing the Breathalyzer, and with operating a motor vehicle while his ability to drive was impaired by alcohol. At the Provincial Court, the Grievor was successful in having the Breathalyzer readings excluded from the evidence presented against him, with an argument under the Canadian Charter of Rights and Freedoms (the Charter). The fact that the Grievor was charged with failing the Breathalyzer and impaired driving was one of the primary reasons that the Grievor was initially suspended, and then dismissed by the Employer. The Grievor vigorously opposed the introduction of the Breathalyzer readings into evidence at this arbitration hearing. The Employer argues that this Arbitrator is not a court of competent jurisdiction to exclude evidence pursuant to the Charter. The Employer submits that the Arbitrator's jurisdiction is created pursuant to the Collective Agreement which was

entered into by the parties, rather than by statute. The Employer further argues that the admission of the Breathalyzer certificate containing the Breathalyzer readings would not bring the administration of justice into disrepute. The Union argues that this Arbitrator is a court of competent jurisdiction and therefore has the power to exclude the admissibility of the Breathalyzer certificate readings pursuant to the Charter. The Union further argues that the admission of the Breathalyzer certificate readings would bring the administration of justice into disrepute.

AWARD:

The grievance fails. An arbitrator does not have jurisdiction over an R.C.M.P. officer to grant a Charter remedy, and there has been no argument to suggest that anything in the Collective Agreement violates the Grievor's Charter rights. This Arbitration Board is not a court of competent jurisdiction, such that it can apply a Charter remedy to an alleged Charter violation, and this Board has no authority under the Collective Agreement to exclude the evidence of the Breathalyzer readings pursuant to section 24 of the Charter. Any remedial powers of this Arbitration Board are restricted to the Collective Agreement and the provisions of the Trade Union Act. Also, if this Board were found to be a court of competent jurisdiction for the purposes of supplying a remedy pursuant to section 24 of the Charter, there is no obligation to exclude the evidence of the Breathalyzer readings. In this factual situation, the admission of the Breathalyzer readings would not bring the administration of justice into disrepute. The Breathalyzer readings are admitted for this Board's purpose. The most relevant evidence concerning the Grievor's driving from Louisbourg to Sydney is the evidence of the Grievor, and of two specific bus passengers. The Arbitrator is satisfied from the evidence of the two passengers that the Grievor was driving in a reckless manner on the evening in question. The Grievor's explanations of his actions are not convincing, and his testimony concerning the amount of alcohol consumed is not credible. Having regard to the Breathalyzer readings and having accepted the testimony of two bus passengers as being accurate, the Arbitrator can only come to the conclusion that the Grievor was impaired by alcohol while driving the bus on the night in question. The Employer had ample justification in disciplining the Grievor. Arbitral jurisprudence makes it clear that transporting the public in the company of a vehicle while one's ability to drive is impaired by alcohol is a most serious offence. The suspension and ultimate discharge of the Grievor are clearly in order in this case.

DECISION: 99-054

Cape Breton Healthcare Complex AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 4600

Veniot, Milton J. - Arbitrator

Victor Tomiczek, for the Union

Raymond Kuszelewski, for the Employer

September 15, 1999

ISSUES:
Skill and ability - Arbitral review - Senior employee if relatively equal 6:3220; - Criteria of ability and qualifications - Examinations and tests 6:3340; Evidence - Burden of proof - Applications - Skill and ability 3:2413.

CIRCUMSTANCES:
The grievance alleges a violation of the Collective Agreement, specifically Article 18 (Seniority) and "others". As a remedy, the Grievor seeks to be placed in the Senior Technologist's position. On June 12, 1998, the Employer posted a notice of internal competition for the temporary full time position of Senior Technologist at the Northside General Facility. Three bargaining unit members applied, including the current incumbent and the Grievor. All three bargaining unit applicants met the minimum qualifications for the position, in the sense that they were formally qualified and could do the work. The Employer, both in evidence and in argument, takes the position that where this occurs, Article 19.02 places upon it an obligation to determine the relative skill and ability of the various applicants. It is to this end that the Employer says its interview process was directed. The Union takes the position that this is what it terms a "seniority case" and that seniority is the determining factor. The Union also argues that a note at the end of the posting constitutes a limitation on the ability of the Employer to an interview process after the applicants papered their bids for the job.

AWARD:
The grievance fails. The Union's position that the Employer could not conduct interviews by virtue of a note at the bottom of the job posting cannot be considered. That would hold that an employer may violate a provision in the Agreement, and evade its contractual obligations by means of an improperly drafted job notice. This case hinges on the interpretation of Article 19.02. Article 19.02, by the words "seniority shall be the determining factor where two or more candidates are deemed by the employer to be relatively equal in the ability, skills and qualifications ...", becomes effective if and only if there is a relative equality in the ability, skills and qualifications to perform the required duties of the position in question. These words require that the Employer first must determine whether there is a relative equality. The interview process used to determine the relative ability and skills of the candidates fairly related to the position, was fairly put to the interviewees,

and was fairly marked. The evidence does not establish that the Grievor was relatively equal to the successful candidate in skill and ability. The incumbent was superior in a fair measurement designed to determine skill and ability. The grievance fails for want of proof, and must be dismissed.

DECISION: 99-055

Fortis Hospitality Corp. AND Hotel Employees & Restaurant Employees International Union (HERE), Local 772

Veniot, Milton J. - Arbitrator

N. Blaise MacDonald, for the Union

Nancy F. Barteaux, for the Employer

Date: N/A

ISSUES:
Settlements 2:3230.

CIRCUMSTANCES:
The arbitration award on the merits of this matter was published on December 17, 1998 (N.S. 98-098). The Arbitration Board remained fully seized of all remedy issues, and met again at the request of the Union to deal with remedy issues. A settlement between the parties was reached part way through the first day of hearing.

AWARD:
There is no award in this matter.

SEE ALSO:
98-98

DECISION: 99-056

Marine Atlantic Inc. AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada)

Veniot, Milton J. - Arbitrator

Victor Tomiczek, for the Union

Eric B. Durnford, for the Employer

September 8, 1999

ISSUES:
Time limits - Mandatory or directory 2:3128; - Restriction on arbitrability 2:1100; - Waiver of 2:3130.

CIRCUMSTANCES:
This grievance concerns the September 25, 1997 dismissal of the Grievor. The Union denies the merits of the allegations against the Grievor. The Union also alleges that a suspension was improperly imposed, and asks that the Grievor be returned to service and compensated for all lost earnings and benefits. The Employer alleges that there was no request for arbitration within the time limits laid out in the Collective Agreement, and no extension of time asked for or granted. As a consequence, the subject matter of the grievance was considered by the Employer to be settled and not subject to arbitration. The Union denies any default on the time limits. If there is any default found, the Union asks the Arbitrator to use a recently enacted provision, section 60(1.1), of the Canada Labour Code to grant an extension. The Employer argues that the provision, which became effective January 1, 1999, does not apply to events which occurred prior to that date. The Employer further argues that if the provision is found to have been operative so as to be a source of jurisdiction, the relief from the time limits ought not to be granted.

AWARD:
The grievance fails. The preliminary objection is upheld; the Arbitrator is without jurisdiction and the grievance must be dismissed. The Union failed to follow the time limits set out in the Collective Agreement. There was no express or inferential waiver of the time limits by the Employer, and the Employer clearly communicated that it would not grant an extension, and was relying on the time limits set out in the Collective Agreement on this point. Section 60(1.1) of the Canada Labour Code is found to have neither retroactive nor retrospective applications to this case, and had the provision been available to the Union, the Arbitrator indicated that the Union did not discharge its burden in showing that there are reasonable grounds for granting the extension.

DECISION: 99-057

Sacred Heart Hospital AND Nova Scotia Nurses' Union (NSNU)

Slone, Eric K. - Arbitrator

Leanne MacMillan, for the Union

Alison McGrath, for the Employer

October 1, 1999

ISSUES:
Interpretation - Aids to interpretation - Prior agreements 4:2240; - Extrinsic evidence 4:2250; - Intention of the parties 4:2100; - Words and phrases - Measurement of time - Hours in excess of 8:2110.

CIRCUMSTANCES:
The Employer is a hospital at which the Grievor is a Nurse. The Union alleges that overtime pay for the Grievor was not paid in full, and seeks an interpretation of the overtime provisions of the Collective Agreement. On January 5, 1999 the Grievor worked her regular eight hour shift, and then worked a further eight hours. Both sides agree that the regular eight hour shift is to be compensated at straight time and that the additional eight hours are to be considered "overtime." The Employer paid the Grievor time and a half for the first four hours of overtime and double time for the next four hours. The Union contends that the entire eight hours of overtime should be paid at double time. The Union states that this interpretation of the relevant article, 7:17(a), is clear and does not lead to any unreasonable result. The Employer says that the ejusdem generis rule of word construction governs here, and that the bargaining history shows that the Employer's view is the correct one.

AWARD:
The Grievance succeeds. The Arbitrator, after having reviewed the language numerous times, has concluded that the meaning contended by the Union is correct. The Employer's interpretation requires the addition of a modifier to produce the meaning it contends. The ejusdem generis rule does not help the Employer. The bargaining history shows only that the Employer may have intended a different meaning in the clause, and that this meaning was not communicated to the Union. Allowing for the possibility that the parties' minds did not really meet when they agreed to this clause, the law, nevertheless, does not allow for one party to avoid the legal effect of the language that is has agreed to, because of a unilateral mistake. In the result, the Arbitrator finds that there is no ambiguity in the language of article 7:17(a), either on its face or disclosed after consideration of extrinsic evidence. The Grievor is entitled to additional pay, the equivalent of two hours of straight time pay.

DECISION: 99-058

Cape Breton-Victoria Regional School Board AND Nova Scotia Teachers' Union (NSTU)

Clarke, Lorne O. - Chair; McLellan, Peter; MacPherson, Ron

Harold Doucette, for the Union

A. Robert Sampson, for the Employer

September 23, 1999

ISSUES:
Interest arbitration 1:0000.

CIRCUMSTANCES:
The Arbitration Board (the Board) was established pursuant to the Teacher's Collective Bargaining Act, R.S. 1989, c. 460, Section 19 after the parties were: ". . . unable to reach agreement with respect to those matters for which a school board is entitled to bargain as an employer as defined by (the Act). . . ." There were 66 matters in this Interest Arbitration to be resolved at the outset of the hearing, and the parties were able to negotiate and sign off 31 articles during the course of the hearing.

AWARD:
The award consists of those subjects and/or articles which have been decided by the Board. The Board has carefully considered the submissions that were made by the parties during the hearing. The Board has noted where a subject matter has been decided by the Board or has been agreed upon or settled by the parties or where there has been a mix of decision making by the Board and the parties. Where there are subjects upon which the parties agreed and signed off, but are not known to the Board, then it follows that they will be incorporated in the final draft of the complete Agreement.

DECISION: 99-059

Highland Fisheries Ltd. AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 4622

MacDougall, R. Lorne - Chair; Kingston, John; Barteaux, Nancy

Victor Tomiczek, for the Union

Eric B. Durnford, for the Employer

September 30, 1999

ISSUES:
Non-suit 3:2640; Withdrawal 2:3230; Seniority - Applications - Promotion, demotion and transfer 6:2100.

CIRCUMSTANCES:
The Grievor alleges that due to his seniority he was entitled to be selected for a posted job under the provisions of Article 12.04 of the Collective Agreement. Witnesses were heard on behalf of the Union and the Grievor with respect to the choice of incumbent having less seniority than the Grievor. The Employer moved for non-suit on the argument that the Union had not presented a case proving violation of Article 12.04. The hearing was adjourned to give the representative of the Union an opportunity to prepare an answer to the Employer's motion. The Union withdrew the grievance.

AWARD:
The grievance is dismissed.

DECISION: 99-063

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

David I. Bloom, for the Union

John B. West, for the Employer

September 17, 1999

ISSUES:
Job classifications and descriptions - Creation or revision 5:2000, 5:2200.

CIRCUMSTANCES:
The Union alleges a breach of the Collective Agreement by the Employer. The Employer, in announcing the creation of its "Simplified Registered Mail Service" project, indicated that new positions created under this project would not be preferred assignments. The Union alleges that the Employer created new, non-preferred positions and assigned them work that corresponds with the duties of preferred assignments. The Employer states that specific mail services were eliminated and as a result, the preferred assignments associated with the secure processing stream were eliminated and additional personnel would be required in the new, non- preferred positions. The Union seeks that the new positions be declared preferred assignments and filled in accordance with Article 12 of the Collective Agreement.

AWARD:
The Grievance fails. The new registered mail product does not correspond with the duties of a preferred assignment within the meaning of Article 12 of the Collective Agreement. The Employer has eliminated the relevant products, not moved them to employees in non-preferred assignments, as the Grievance alleges.

SEE ALSO:
98-100

DECISION: 99-064

Nova Scotia (Business & Consumer Services) AND Nova Scotia Government Employees Union (NSGEU)

North, Gregory I. - Arbitrator

David J. Roberts, for the Union

Sarah Bradfield, for the Employer

July 7, 1999

ISSUES:
Procedure - Powers of Board of Arbitration - Preliminary objections 3:2100; Disciplinary penalties - Mitigating factors 7:4400; Time limits - Delay 2:3210.

CIRCUMSTANCES:
This grievance alleges that the Grievor, a Vehicle Compliance Officer, was terminated without cause by the Employer. The hearing was divided to decide a preliminary issue brought forward by the Union: specifically, that there was undue delay between the event in question and the disciplinary action. The Union argues that the delay causes the discipline to be invalid, and that such a delay causes prejudice to the Grievor's ability to respond. The Employer argues that there is no provision in the Collective Agreement which requires the Employer to take disciplinary action within a specified period of time. Also, the R.C.M.P. took over the investigation and the Employer was unable to notify the Grievor of the allegations, or otherwise interfere with the investigation. Furthermore, the Grievor deliberately engaged in efforts to cover up his actions, which contributed to the delay.

AWARD:
The preliminary motion is dismissed. There was no substantial delay in the actual decision to impose discipline. Furthermore, the Grievor's actions were deliberate and of the sort that would not be forgotten regardless of the time passed, and no substantial prejudice resulted from any delay that might be inferred or presumed.

DECISION: 99-064. A

Nova Scotia (Business & Consumer Services) AND Nova Scotia Government Employees Union (NSGEU)

North, Gregory I. - Arbitrator

David J. Roberts, for the Union

Sarah Bradfield, for the Employer

October 15, 1999

ISSUES:
Discipline and discharge - Just cause 7:1200; - Grounds for - Theft 7:3310, 7:3312, 7:3314; Disciplinary penalties - Mitigating factors 7:4400.

CIRCUMSTANCES:
This grievance involves an undisputed theft carried out by the Grievor on November 20, 1996. The Employer submits that the Grievor's criminal activities destroyed the fundamental trust necessary for the position of Vehicle Compliance Officer. In addition, the Employer submits that the Grievor has not apologized, has not offered to repay the money taken, and has not offered assurances that his actions would not be repeated in future. The Union submits that the Grievor has admitted that he committed an act of serious misconduct, and did not deny his actions once they were uncovered. The Union further submits that the Grievor has an unblemished disciplinary record, that his actions were entirely out of character and not for personal gain. The Union submits that the penalty should be mitigated and a lesser disciplinary response be substituted for the discharge.

AWARD:
The grievance fails. The Grievor was designated as a Peace Officer pursuant to specific legislative provisions. When an employee in a very visible position of significant public trust steals money from his employer, discharge is a fair and reasonable response. The dismissal of the Grievor is confirmed.

DECISION: 99-065

Associated Freezers Corp. AND United Steelworkers of America, Local 1015

MacKeigan, Peter J. - Arbitrator

Bernie Campbell, for the Union

Catharine Raymond, for the Employer

October 19, 1999

ISSUES:
Skill and ability - Criteria of ability and qualifications 6:3300 - Examinations and tests 6:3340, - Requirements of the job 6:3100.

CIRCUMSTANCES:
The Grievor, who already worked for the Employer, applied for a position as Office Clerk with the Employer, pursuant to a job posting dated September 18, 1998, and was the only person to apply. The Employer retained the services of Kelly Temporary Services Inc. to test the Grievor's abilities and was advised that the Grievor was "not qualified". The Grievor was advised by the Employer that he did not meet the basic requirements and would not be offered the job. The principal issue is the reference in Article 8.01 as to what is sufficient ability necessary for this posting, and whether the use of Kelly Temporary Services Inc. for the testing and for their standards is appropriate.

AWARD:
The grievance succeeds. When Kelly Temporary Services Inc. advised the Employer that the Grievor was not qualified, the Employer had a responsibility under Article 8.01 to determine whether the test standards were appropriate. The Collective Agreement outlines a set of job requirements for Office Clerk applying to a "new hire", and another set of requirements for Office Clerk when hiring an employee who already works for the company. The test of Kelly Temporary Services Inc. seems to be of the standard for new hires, and is different than is required under Article 8.01. The Arbitrator is satisfied that the Grievor has met the test of sufficient ability.

DECISION: 99-066

Babcock & Wilcox Canada AND International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 73

Slone, Eric K. - Arbitrator

Raymond Larkin, for the Union

Scott Sterns, for the Employer

October 20, 1999

ISSUES:
Statutes - Applied by Boards of Arbitration 2:2100; Collective agreement - Overriden by statute 1:4000.

CIRCUMSTANCES:
This grievance claims that the Employer had a continuing obligation to pay its Boilermakers while they were laid off following a work refusal, pursuant to the Occupational Health and Safety Act (OHSA). Work on a refurbishing project at the work site was disrupted when asbestos was found to be present. The Employer argues that it did everything in its power to provide a safe working environment. The Employer argues that this Arbitrator's award concerning another case involving the same asbestos incident imposed "absolute liability" and that a "strict liability" standard should be used here instead. The Employer also argued that the Collective Agreement contains a provision allowing lesser payments to made to employees in some shut-down circumstances.

AWARD:
The grievance succeeds. The employees who refused to work because of a concern for their health and safety have a prima facie right to be paid. The distinction between strict and absolute liability was developed within a criminal law context, but here civil liability is the context and the Employer's argument for the application of strict liability does not apply. The OHSA indicates that the civil burden of a reasonable health and safety refusal to work is to be borne by the Employer and not by the employee. The Collective Agreement does not override the OHSA. The parties are given one week to settle compensation issues and to report back to the Arbitrator.

SEE ALSO:
99-067

DECISION: 99-067

Kamyr Enterprises Inc. AND International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 73

Slone, Eric K.- Arbitrator

Raymond Larkin, for the Union

Ross Langley, for the Employer

October 15, 1999

ISSUES:
Statutes - Applied by Boards of Arbitration 2:2100.

CIRCUMSTANCES:
This grievance claims that the Employer had a continuing obligation to pay its Boilermakers while they were laid off following a work refusal pursuant to the Occupational Health and Safety Act (OHSA). After dust became a serious problem, some Union members exercised their right under s.43 of the OHSA to refuse to work until their concerns had been addressed. The Department of Labour confirmed a serious asbestos problem. The Employer claims that it was within its rights to lay off its workforce when, for reasons not within its own control and not of its making, the workplace was off limits and work could not progress.

AWARD:
The grievance succeeds. The right to continue to be paid is an essential feature of the OHSA, and not to provide this right puts workers in a conflict between safety and their financial interest, and gives them a strong disincentive to report unsafe conditions. An employer cannot rely on its own lack of control over the workplace as a reason for avoiding the responsibilities under the OHSA. The scheme of the OHSA does not contemplate employers using layoffs to circumvent the operation of s.43(7), no matter how expensive those obligations may be. The parties will determine between themselves the amount of compensation payable.

DECISION: 99-068

Dalhousie University AND Dalhousie Faculty Assn.

Bruce, Brian D. - Arbitrator

Peter Engelmann, for the Union

Eric Durnford, for the Employer

October 15, 1999

ISSUES:
Time limits - Continuing grievance 2:3128; - Relief against non-compliance 2:3140; - Waiver of 2:3130; Mootness 2:1200, 2:3230.

CIRCUMSTANCES:
This arbitration involves a formal grievance with a Professor as Grievor and the Dalhousie Faculty Association as an additional grievor (hereinafter referred to as the "Association"). The Employer raises three preliminary issues which are the subject of this award, not the merits of the case. The Employer argues first that the grievance was not filed within the mandatory time limits established in the Collective Agreement. Next, the Employer claims that the Grievor, having failed to make application for reappointment with the time limits, cannot claim that she would not have received a fair and impartial assessment, and also that there is no right in the Collective Agreement for a Faculty Member to seek extension of a probationary contract and, therefore, denial of such an extension is nongrievable. Finally, the Employer takes the position that there is no effective remedy at this time, as the Grievor has found permanent employment elsewhere, and the present case is moot.

AWARD:
The preliminary issues raised by the Employer are denied. To begin, the present case is of a continuing nature, and the Employer also waived compliance with the time limits for filing of a grievance given its willingness to proceed with informal discussions. Furthermore, the Arbitrator would be prepared to exercise his authority, under the Collective Agreement, to relieve against non-compliance with time limits if the above conclusions were incorrect. In relation to the second issue, the Employer is mistaken in its assessment of the allegation. The allegation is that there was a continuing climate which made it difficult for the Grievor to seek reappointment, to work in a discrimination free environment, and to enjoy academic freedom. Furthermore, it was acknowledged in the evidence that the Association-Board Committee has the discretionary authority on an ad hoc basis to approve extensions, and that the Grievor's concerns were issues of fairness, discrimination and academic freedom, as opposed to a substantive right to an extension. These allegations will be subject to argument and the evidence of the parties with respect to the merits of the grievance, yet at this time, the Employer's objection that there is no grievable issue is denied. Finally, the Association has a continuing interest in the case, given the human rights nature of many

of the allegations. The Grievor also has a continuing interest, in that there is a potential financial loss that she may have suffered, and if the allegations made in the grievance are substantiated, the declarations sought in the grievance are of continuing relevance and importance.

DECISION: 99-069

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

Jeff Woods, for the Union

Joanne Harrington, for the Employer

September 27, 1999

ISSUES:
Overtime - Remedies 5:3240, 2:1423; - Distribution of overtime - Equitable distribution 5:3224.

CIRCUMSTANCES:
The Grievor, a Relief Lead Hand, was allegedly bypassed in the administration of overtime for October 21 and 22, 1998. The Union alleges a breach of the Collective Agreement by the Employer, and requests that the Grievor be compensated for earnings lost on the two days in question, with interest at the Bank of Canada rate. The provisions of Article 15 of the Collective Agreement outline specific procedures to be followed when offering overtime to employees.

AWARD:
The grievance succeeds. All employees in the Windsor Post Office are on the equal opportunity list established under Article 15 of the Collective Agreement. The Grievor should have been offered overtime for the dates in question, if the provisions of Article 15 had been followed. In denying the Grievor the opportunity to work overtime on October 21 and 22, 1998, the Employer breached the Collective Agreement. Compensation is to be paid to the Griever on the basis described.

NOTES:
Written confirmation of the award is dated October 17, 1999.

DECISION: 99-070

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

Jeff Woods, for the Union

Joanne Harrington, for the Employer

October 17, 1999

ISSUES:
Overtime - Scheduling 5:3200, 5:3100; - Distribution of overtime - Seniority 5:3222, - Equitable distribution 5:3224; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES:
The grievance alleges that the Employer bypassed regular employees in the administration of overtime by assigning a Temporary Employee to an uncovered route. The Employer argues that it applied Article 17.06 of the Collective Agreement properly. The Union argues that in applying article 17.06, the Employer should have offered the route in question to the Relief Letter Carrier before offering it to a Temporary Employee. Further, if the Employer had used Article 17.04 to fill the vacancy, then the route would have been offered to Full-Time Letter Carriers, and as a result of not being offered the route, these Employees were improperly denied overtime.

AWARD:
The grievance succeeds in part. There was a breach of the Collective Agreement in that the vacancy was not filled following the procedures set out in the Collective Agreement, but no payment is ordered as there were no losses for which it is appropriate to order compensation.

DECISION: 99-071

Canada Post Corp. AND Canadian Union of Postal Workers

Christie, Innis - Arbitrator

Jeff Woods, for the Union

Joanne Harrington, for the Employer

September 27, 1999

ISSUES:
Vacation - Scheduling vacation 8:3240; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES:
This grievance alleges a breach of the Collective Agreement which continues in effect. The Employer suggested changes to the Letter Carrier vacation schedule, and when the Union refused to consult and consider changes to the schedule, the Employer made the changes unilaterally. The Union argues that Article 19.16 ensures that the Employer may not change the vacation bid schedule practices without Union consent.

AWARD:
The grievance succeeds. Matters covered by clauses (a) and (b) of Article 19.16 cannot be unilaterally changed by the Employer. The prior practice for bidding on vacations at the New Glasgow Post Office is to be restored.

NOTES:
Written confirmation of the award is dated October 17, 1999.

DECISION: 99-073

Springhill (Town) AND Canadian Union of Public Employees (CUPE), Local 919

Ashley, Susan M. - Arbitrator

Kathy MacLeod, for the Union

Carole Beaton, for the Employer

October 18, 1999

ISSUES:
Estoppel 2:2200, 2:2210, 2:2220.

CIRCUMSTANCES:
This case concerns four Grievors who began work for the Employer as Part-time or Seasonal workers, and became Full-time later. After reaching ten years of service, each of the Grievors took four weeks vacation, with their supervisors' knowledge. Each then received a letter indicating that he was not entitled to four weeks vacation, and stating when he would be entitled. The Union argues that since 1992 the Grievors had received vacation on the basis of calendar years of service, pursuant to Article 19.01 of the Collective Agreement, and that this practice was changed in 1998 to a pro-rated basis. This change, the Union continues, was not contemplated in the Collective Agreement, and goes against past practice. Further, the Employer is estopped by its conduct from relying on the strict wording of the Collective Agreement. The Employer argues for the strict wording of the Collective Agreement.

AWARD:
The grievance succeeds. The grievance is allowed on the basis of equitable estoppel. The Employer is bound to the four weeks vacation entitlement granted to the Grievors until the expiration of the Collective Agreement, at which time, the parties may bargain the issues raised in this grievance.

DECISION: 99-074

Atlantic Wholesalers Ltd. AND Bakery, Confectionery & Tobacco Workers' International Union (BCT), Local 446

Kydd, William H. - Arbitrator

Rene Quigley, for the Union

Peter McLellan, for the Employer

October 27, 1999

ISSUES:
Interpretation - Ambiguity 3:4400, Extrinsic evidence 4:2250, Intension of the parties 4:2100.

CIRCUMSTANCES:
The Union claims that Part-Time Employees are not receiving benefits in the manner outlined in the Collective Agreement. The Employer argues that the last sentence of Article 11.02A was added to the final form of the Collective Agreement by mistake, and that there was no agreement that Part-Time Employees would be eligible for their benefits package after three months' service. The Union argues that the clear language of the Collective Agreement should govern, and that the Article reflects matters that the parties had agreed to early in negotiations.

AWARD:
The grievance fails. The Employer produced convincing proof that the final form of Article 11.02A does not reflect the true agreement of the parties, which was to include the sentence "Part-time employees will be eligible for the part-time benefits package."

DECISION: 99-075

A & G Crane Ltd. AND United Assn. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 244

Slone, Eric K. - Arbitrator

Raymond Larkin, for the Union

Richard B. Baker, for the Employer

October 30, 1999

ISSUES:
Statutes - Applied by Boards of Arbitration 2:2100.

CIRCUMSTANCES:
This grievance claims that the Employer had a continuing obligation to pay its Pipe-fitters while they were laid off, following a work refusal pursuant to the Occupational Health and Safety Act (OHSA). On September 28, 1999, all of the Pipe-fitters exercised a refusal to work when they heard about the discovery of asbestos in the workplace. On October 1, 1999, the Employer laid off most of its work force, recalling them on October 8 and 9, 1999. The Union claims entitlement to transportation and subsistence allowances, along with the other benefits and pay that would have been paid to the Pipe-fitters during the lay off period. The Employer stressed that to pay the Pipe-fitters wages and benefits for that time would be very burdensome to a company of its small size.

AWARD:
The grievance succeeds. Like the two cases, Kamyr, and Babcock, which arose from the same circumstances and have similar facts and arguments, this Employer cannot escape its obligation to pay its Pipe-fitters by way of a short lay off. The affected employees are entitled to be paid the same wages and to receive the same benefits that they would have received had they continued to work.

SEE ALSO:
99-066, 99-067

DECISION: 99-076

Trenton Works Ltd. AND United Steel Workers of America, Local 1231

MacDougall, R. Lorne - Arbitrator

John Kingston, for the Union

John C. MacPherson, for the Employer

October 28, 1999

ISSUES:
Statutes - Applied by Boards of Arbitration 2:2100.

CIRCUMSTANCES:
The Grievors in this case are those employees who did not refuse to work, but who were sent home as a result of other employees' work refusal, pursuant to the Occupational Health and Safety Act (the Act). The safety issue affected only one function of the production line, but the whole line had to be shut down, and approximately sixty employees were sent home. The employees who refused to work were paid for the time lost, but the Grievors were not paid. The Union claims that the Grievors are entitled to be compensated for hours lost. The Union argues that once the Act was put into play, then all of the employees affected by the refusal were covered by the Act. The Employer claims that there are no arbitral cases to support the position of the Union, and the employees were sent home due to legitimate business reasons.

AWARD:
The grievance fails. Section 22 of the Act does not make allowance for the broad interpretation that the work refusal of the five employees somehow includes the Grievors. The section is based on each employee personally refusing to work, which the Grievors did not, and the Arbitrator has no jurisdiction to place them under the umbrella of the five employees who refused to work.

DECISION: 99-077

Reinforced Plastic Systems Inc. AND Industrial Union of Marine & Shipbuilding Workers of Canada, Local 24

Kydd, William H. - Arbitrator

Les Holloway, for the Union

David Reid, for the Employer

October 29, 1999

ISSUES:
Discipline and discharge - Grounds for - Conditional reinstatement, violation of 7:4100; Disciplinary penalties - Culminating incident 7:4310 - Innocent absenteeism 7:3210.

CIRCUMSTANCES:
This grievance concerns the termination of the Grievor's employment pursuant to a "last-chance agreement." The Union argues that the agreement precludes the Employer from relying on events that precede its date, and that subsequent events are insufficient grounds for dismissal. Alternately, the Union argues that the incidents which led to the Grievor's dismissal were injuries and not the fault of the Grievor. Further, the incidents were not related to alcohol, which had prompted the last-chance agreement, and dismissal was arbitrary and outside of the intended agreement. The Employer argues that there was a pattern of non-culpable conduct sufficient to warrant termination.

AWARD:
The grievance fails. The evidence supports the Employer's contention that the incidents on which it based its decision to terminate were similar in pattern to those that had motivated its first decision to terminate. The Employer's decision is found not to be arbitrary, and is consistent with its earlier concerns. The Grievor breached the attendance clause in the agreement, and the consistent arbitral approach, under similar circumstances, is to uphold the penalty provisions in last chance agreements.

DECISION: 99-078

Halifax Regional School Board AND Nova Scotia Union of Public Employees (NSUPE), Local 2

MacKeigan, Peter J. - Arbitrator

Nancy Elliot, for the Union

Ian Pickard, for the Employer

November 1, 1999

ISSUES:
Interpretation - Intention of the parties 4:2100, Words and phrases - Employees - Temporary 5:1124.

CIRCUMSTANCES:
This case concerns sick leave entitlement for Casual School Board Custodians, who came into the Bargaining Unit upon the signing of the first Collective Agreement, January 29, 1999. The Union argues that Casual Employees fall within the definition of "Employee" in the Collective Agreement, and accordingly have all of the sick leave benefits found in Article 13.10. The Employer argues that the Article creates a finite group of people to which the Article applies, and it does not include Casual Employees.

AWARD:
The grievance fails. The purpose of the Article is to provide sick leave credits to employees who were under previous plans, and to correct some form of inequity as a result of a merger of these plans. The Article does not extend to Casual Employees who were not entitled to sick leave credits under any former plan.

DECISION: 99-079

Halifax Regional School Board AND Nova Scotia Union of Public Employees (NSUPE), Local 2

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
The matter was settled with no written decision.

DECISION: 99-080

Meridian Construction AND United Brotherhood of Carpenters & Joiners of America, Local 83

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
This matter was settled with no written decision.

DECISION: 99-081

Ace Towing Ltd. AND International Union of Operating Engineers (IUOE), Local 721

MacKeigan, Peter J. - Arbitrator

N/A, for the Union

N/A, for the Employer

November 4, 1999

ISSUES:
Collective agreement - Form and content - Pension, insurance and welfare plans 4:1400.

CIRCUMSTANCES:
The Union filed a grievance, dated August 24, 1999, against the Employer for failure to remit contributions to the Trust Fund pursuant to the Collective Agreement.

AWARD:
The grievance succeeds. The Employer has failed to pay contributions to the Trust Fund, as outlined, and is ordered to pay the Union the amounts described in this award.

DECISION: 99-082

Victoria Haven Nursing Home AND National Automobile, Aerospace, Transportation & General Workers Union of Canada (CAW-Canada), Local 4600

DeMont, Eric G. - Arbitrator

Lynn Pollock, for the Union

Conrad LeBlanc, for the Employer

October 5, 1999

ISSUES:
Statutory holidays - Qualifying days - Strike 8:3124; Collective agreement - Term of operation 4:1620 - Retroactivity 4:1610.

CIRCUMSTANCES:
This grievance concerns certain Nursing Home Employees not being paid for a statutory holiday, November 11, 1998. These Nursing Home Employees were on a legal strike at the time of the holiday. The Employer argues that there was no collective agreement in force on November 11, 1998, therefore there is no right to be paid for the holiday. Alternately, the Employer argues that the New Collective Agreement came into force November 1, 1998, but that the benefits came into effect on November 22, 1998, therefore no benefits are payable before November 22, 1998. The Union argues that the Old Collective Agreement remained in place under Section 35 of the Trade Union Act.

AWARD:
The grievance fails. Because of the dates of the grievances filed and the retroactivity of the New Agreement, it is appropriate to consider the grievances under the New Agreement and not the Old Agreement. The New Agreement expressly provides that benefits are retroactive only to November 22, 1998, and, as a result, do not apply to November 11, 1998.

DECISION: 99-083

Halifax Regional School Board AND Nova Scotia Union of Public Employees (NSUPE), Local 2

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
The matter was settled with no written decision.

DECISION: 99-084

Hanais AND United Brotherhood of Carpenters & Joiners of America, Local 83

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
The matter was settled with no written decision.

DECISION: 99-085

Municipal Ready-Mix Ltd. AND International Union of Operating Engineers (IUOE), Local 721

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
The matter was settled with no written decision.

DECISION: 99-086

Bridgewater (Town) AND Canadian Union of Public Employees (CUPE), Local 1092

Veniot, Milton J. - Arbitrator

Linda Clancy, for the Union

Karin McCaskill, for the Employer

November 29, 1999

ISSUES:
Collective agreement - Overridden by statute 1:4000 , Term of operation 4:1620 - Retroactivity 2:1200, 4:1610, Wage schedules 8:1300; Wages - Arbitration of rates 8:1000

CIRCUMSTANCES:
This grievance concerns the Union's request that the 3% of wages that were lost to Employees due to the Public Sector Compensation (1994-1997) Act rollback be placed on their hourly rate of pay, retroactive to November 1, 1997. In this case, there are two Collective Agreements which contain language creating an apparent overlap in effective dates: The First Collective Agreement, by virtue of its duration language; and the Second Collective Agreement, by virtue of its retroactivity language. The Employer argues that the Second Agreement applies to the grievance, and since it sets specific rates of pay, there is no breach of the Agreement. The Union argues that the Second Agreement is the relevant one, and that the 3% should be added to the new, higher wages set out in the Second Agreement.

AWARD:
The grievance succeeds to the extent indicated. On November 1, 1997, because the rollback expired, affected employers became liable to return to paying 100% of wages payable under their collective agreements. In this case, failure to do so breached the First Collective Agreement, which was the only agreement in effect at the time. The Employer must pay the difference between what was actually paid to the Employees, and 100% of the wages outlined in the First Collective Agreement, for the period between November 1, 1997 and February 13, 1998, the date that the Second Collective Agreement came into being. It may be that this difference has already been paid in the Second Agreement wage settlement.

DECISION: 99-087

L & R Drilling & Blasting Ltd. AND Labourers International Union of North America, Local 615

Kydd, William H. - Arbitrator

N/A, for the Union

N/A, for the Employer

Date: N/A

CIRCUMSTANCES:
This matter was settled with no written decision.

DECISION: 99-088

Breton Insulations Ltd. AND International Assn. of Heat & Frost Insulators & Asbestos Workers, Local 116

MacKeigan, Peter J. - Arbitrator

N/A, for the Union

N/A, for the Employer

November 26, 1999

ISSUES:
Collective agreement - Form and content - Pension, insurance and welfare plans 4:1400.

CIRCUMSTANCES:
The Union filed a grievance, dated August 25, 1999, against the Employer for failure to remit contributions to the Trust Fund pursuant to the Collective Agreement.

AWARD:
The grievance succeeds. The Employer has failed to pay contributions to the Trust Fund, as outlined, and is ordered to pay the Union the amounts described in this award.

DECISION: 99-089

Halifax Regional School Board AND Nova Scotia Union of Public Employees (NSUPE), Local 2

Veniot, Milton J. - Arbitrator

Nancy Elliot, for the Union

John C. MacPherson, for the Employer

December 6, 1999

ISSUES:
Arbitrability - Agreement as primary source of jurisdiction 2:1100, 2:1200; - Concurrent jurisdiction 1:4000; - Delay 2:3210; - Existence of collective agreement 4:1000.

CIRCUMSTANCES:
This award examines seven preliminary matters of arbitrability regarding this grievance, which concerns whether the Employer is obligated to pay its Custodial Workers as agreed to in a document dated July 22, 1994. The Employer argues that the document is contrary to the Public Sector Compensation (1994-1997) Act, making it illegal, and therefore it can form no part of the Collective Agreement. Further, the Employer argues that the grievance is inarbitrable because: it does not claim a breach of the Collective Agreement; it does not arise out of the Collective Agreement; the document has lapsed; the Public Sector Compensation (1994-1997) Act supercedes the document, under section 43(1) of the Trade Union Act; and the grievance is untimely. Further, the Employer argues that there has been undue delay in processing the grievance and it should not proceed.

AWARD:
This grievance is found to be arbitrable in the limited sense that in certain circumstances, the general law recognizes that contract illegality may not preclude remedial action. It is up to the Union to determine if there is a case to be made for remedy on that basis. The Arbitrator, upon examining each of the preliminary objections, finds that none of the objections prevents the case from being heard.

DECISION: 99-090

Citadel Properties Ltd. AND Bakery, Confectionery & Tobacco Workers' International Union (BCT), Local 446

North, Gregory I. - Arbitrator

Rene Quigley, for the Union

Karin A. McCaskill, for the Employer

April 30, 1997

ISSUES:
Fairness - Management duty to act fairly 4:2320; Union - Activity and business - Transfer because of 5:2300; Management rights - Schedules 5:3100.

CIRCUMSTANCES:
The Grievor alleges that the Employer harassed him by altering terms and conditions of his employment as a Cook, because of his Union activities. The Union argues that the Employer must be fair and reasonable in its decisions, and states that there is no clear evidence establishing economic savings as a result of the elimination of the Staff Cafeteria Cook position, and requests that the Employer be ordered to meet with the Grievor to review his scheduled hours. The Employer claims that there has been no violation of the Collective Agreement, and that any changes made to

the terms and conditions of the Grievor's employment were for sound business reasons. The Employer argues that there is no obligation under the Collective Agreement to be fair and reasonable in the present case, that the evidence does not support that the Employer acted in an unfair or unreasonable manner, and that there is no evidence of harassment.

AWARD:
The grievance fails. There has been no evidence to support the allegation that the Employer's decision was motivated by anti-union sentiments or a deliberate scheme of harassment. Nothing in the Collective Agreement prevented the Employer from making workplace adjustments. Based on the evidence offered, the decision of the Employer to eliminate the Staff Cafeteria Cook position was motivated by purely business considerations.

DECISION: 99-100

Nova Scotia (Human Resources) AND Nova Scotia Government Employees Union (NSGEU)

Charles, W.H. - Chair

Kimberley H. W. Turner, for the Union

Sarah Bradfield, for the Employer

March 31, 1999

ISSUES:
Bargaining unit - Employees excluded - Supervisors and foremen 5:1126.

CIRCUMSTANCES:
This is an application made by the Employer to exclude the position of Coordinator of Campus Safety and Security from the bargaining unit pursuant to clause 11(1)(e) of the Civil Service Collective Bargaining Act. The Employer argues that the Coordinator position meets the necessary criteria for management and confidential positions on a number of points. These include being involved in the grievance process on behalf of the Employer; formulating, developing and administering policies and programs; and supervising employees. The Union argues that the Coordinator position does not involve any of these duties to the extent required for an exclusion.

AWARD:
The application for exclusion fails. The current incumbent lacks real authority in the grievance process, in policy development and in his supervisory functions. The onus of proving that the Coordinator position should be excluded from the bargaining unit has not been met by the Employer.

Part 2

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1999

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